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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM AND INCLUDING A PORTION OF THE DECISIONS HANDED DOWN APRIL 16, 1876, TO AND INCLUDING DECISIONS OF SEPTEMBER 19, 1876.

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,

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CHARLES J. FOLGER,

CHARLES A. RAPALLO,

CHARLES ANDREWS,

THEODORE MILLER,

ROBERT EARL,

ASSOCIATE JUDGES.

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CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

COMMENCING APRIL 18, 1876.*

HENRY VAN DENBURGH et al., Respondents, *v.* THE PRESIDENT AND TRUSTEES OF THE VILLAGE OF GREENBUSH, Appellants.

The special mechanic's lien law of 1865 for the county of Rensselaer (chap. 778, Laws of 1865) was not repealed by the act of 1869 (chap. 558, Laws of 1869) amending the general lien law of 1854 (chap. 402, Laws of 1854).

Assuming that said act of 1865 was by implication repealed by the act of 1869, it was restored by the act of 1870 (chap. 194, Laws of 1870) exempting the county of Rensselaer from the operation of said act of 1869.

Accordingly, *held*, that a notice of lien in said county was properly filed in the office of the town clerk, not of the county clerk.

Where a repealing statute is itself repealed, the first statute is revived, and it matters not whether the repeal in either case be by express language or by implication.

(Submitted April 5, 1876; decided April 18, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment

*Judge FOLGER was absent, by reason of illness, for a part of the time covered by this volume, and took no part in the judgments in cases argued or decided between March 18, 1876, and May 22, 1876, unless it is otherwise particularly noted. —[REP.

in favor of plaintiffs, entered upon the report of a referee. (Reported below, 4 Hun, 795.)

This action was brought to foreclose a mechanic's lien for materials furnished by plaintiffs to a contractor for the erection of two engine-houses in the village of Greenbush, Rensselaer county.

A notice of lien was filed December 17, 1872, with the town clerk of the town of Greenbush, in which town said village is located.

R. A. Parmenter for the appellants.

G. P. Jenks for the respondents. The notice of lien should have been filed in the office of the town clerk. (§ 4, chap. 778, Laws 1865; 1 Laws 1866, 9; *Speilman* v. *Shook*, 11 Mo., 340.)

EARL, J. It is claimed on the part of defendants that at the time the plaintiffs furnished the materials for which they claim their lien, the law required that the notice of the lien should be filed in the county clerk's office instead of the town clerk's office, and if they are wrong in this, that there was no lien law of any kind applicable to the county of Rensselaer. To determine the questions thus presented will require an examination of the several lien laws applicable at different times to that county.

The first mechanic's lien law applicable to that county was passed in 1852 (chaps. 108 and 384 of the laws of that year). The last chapter applied to that and several other counties, and as to that county superseded the former chapter. That law provided for filing the lien in the town clerk's office. By chapter 402 of the Laws of 1854 a lien law was enacted for the counties of Westchester, Oneida, Cortland, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange and Dutchess, and that act provided that the lien should be filed in the town clerk's office. It repealed all former lien laws as to the counties mentioned in the title of

the act. By chapter 254 of the Laws of 1858 the act of 1854 was extended and declared to be applicable to all the counties of the State except New York and Erie, and all inconsistent acts were repealed. Thenceforth, until 1865, the act of 1854 was applicable to Rensselaer county. In 1865 a special lien law for that county was enacted. (Chap. 778, published in Laws of 1866, p. 9.) That law provided that the lien should be filed in the town clerk's office, and repealed, as to that county, all other lien laws. In 1869 (chap. 558) an act was passed to amend the lien law of 1854. Section 1 of that act amended section 1 of the act of 1854 by extending its provisions to all the counties in the State except Erie, Kings, Queens, New York and Onondaga, and providing that the notice of lien should be filed in the office of the county clerk. There was no repealing clause in the act. In 1870 (chap. 194) an act was passed which simply provided that section 1 of the act of 1869 is "amended so as to except from said act the county of Rensselaer."

The law was in this condition when plaintiffs filed their notice of lien in the office of the town clerk of Greenbush and attempted to acquire the lien which they seek to enforce in this action. The first question to be considered is the effect of the act of 1869 upon the lien law of 1865, specially applicable to the county of Rensselaer. It is claimed on the part of the appellants that the effect was to repeal the law of 1865 and to bring Rensselaer county again under the law of 1854. It is a question of legislative intent. By the act of 1858 the legislature placed that county under the law of 1854, and there it remained until 1865, when a special law was passed, with peculiar provisions applicable to that county only. Can it be supposed that the legislature meant by the act of 1869 to restore in its application to that county the law of 1854, which had once been repealed as to that county, without any special repeal of the law of 1865? We think not. It is a rule of construction that a special statute providing for a particular case or applicable to a particular locality is not repealed by a statute general in its terms and

application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would be taken strictly, and but for the special law include the case or cases provided for by it. (*Foster's Case*, 11 Coke, 63, 64; *In the Matter of the Evergreens*, 47 N. Y., 216; *Matter of Com. of Central Park*, 50 id., 493; *Canal Co.* v. *Railroad Co.*, 4 Gill & John., 6; Smith's Stat. and Con. Law, 905.)

The act of 1869 contained no repealing clause, and that the legislature did not mean under the circumstances by the general language used to supersede the special law of 1865 is made more manifest by the act of 1870, evidently passed to remove doubts which had been raised by the general language carelessly used in the act of 1869. It cannot be supposed that the legislature in 1869 deliberately repealed the law of 1865 and restored the law of 1854, and then the next year, at the earliest opportunity, repealed the act of 1869 as to that county and restored the law of 1865. The history of legislation upon this subject, applicable to that county, and all the circumstances, show quite clearly that there was no intention by the legislature in 1869 to interfere with the special act of 1865. But if we should assume the contrary, that the law of 1869 did, by implication, repeal the law of 1865, then the law of 1870 restored that law. It is a general rule of law that when a repealing statute is itself repealed, the first statute is revived, and it matters not whether the repeal in either case be by express language or by implication. (Potter's Dwarris on Stat., 159; 1 Black. Com., 90; Smith's Stat. and Con. Law, 909; 1 Kent's Com., 466; *Commonwealth* v. *Churchill*, 2 Metc., 118; *Hastings* v. *Aiken*, 1 Gray, 163; *Wheeler* v. *Roberts*, 7 Cow., 536; *People* v. *Davis*, 61 Barb., 456; *Churchill* v. *Marsh*, 2 Abb. Pr., 219, 225.) This is a common-law rule of statutory construction, and is based upon the reason that the first law ceased to have force because of the repealing law, and when that was annulled that it was the legislative intent that the first law should again have being. When an act is repealed it must be considered (except as to transactions past

and closed, and possibly as to some pending cases) as if it had never existed.

By the act of 1870 Rensselaer county was excepted from the act of 1869, not, as claimed by the learned counsel for the defendants, from section 1 of that act only, but from the operation of the whole act. The effect was to repeal the act so far as concerned that county if it ever had any force there. The form in which the legislative intent was expressed by exception rather than repeal can make no difference. The same result was accomplished. The law of 1869 ceased operation in Rensselaer county and the law of 1865 again has vitality. It cannot be supposed, in view of the history of legislation upon the subject, that the legislature intended to leave that county without any lien law.

It follows that the law of 1865 was in force, and that the lien was, therefore, properly filed in the town clerk's office.

The further claim is made on behalf of the defendants that plaintiffs could not, under the law, obtain a lien upon the engine-houses because they were public buildings for the public use. It is sufficient to say that this defence was not set up in the answer, and does not seem to have been distinctly claimed at the trial or passed upon by the referee. (*Shattel* v. *Woodward*, 17 Ind., 225.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

ANSON N. BECKER, Appellant, *v.* GEORGE HOWARD et al., Respondents.

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118 163
66 5
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A purchaser, at a legal tax sale, of land upon which there is at the time a mortgage duly recorded, upon receipt of the comptroller's deed, acquires a valid title, subject to the right of the mortgagee to redeem under the statute. (Chap. 427, Laws of 1855, § 76, *et seq.*)

The mortgagee may, at any time within six months after receiving notice of sale, redeem; but he is not compelled to await the reception of such notice before redeeming.

Statement of case.

The purchaser at the tax sale is not compelled to give any notice to the mortgagee in order to perfect his title. He can, however, only limit the time for redemption by giving notice.

A purchaser at such a sale is not affected by a subsequent foreclosure of the mortgage and sale of the mortgaged premises, where he is not made a party to the foreclosure.

(Argued March 30, 1876; decided April 18, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of defendants, entered upon a decision of the court on trial without a jury. (Reported below, 4 Hun, 359.)

This was an action for trespass upon certain lands in Cattaraugus county. Both parties claimed title to the *locus in quo*.

Plaintiff claimed title under a foreclosure and sale of the premises upon a mortgage duly recorded. The action for foreclosure was commenced August 17, 1868. Defendants were not made parties. Judgment was perfected January 7, 1869, and the premises sold thereunder February 26, 1869.

Defendants claimed title under a sale of the lands by the comptroller for unpaid taxes. The lands were bid off by them at such sale November 24, 1866, and they received the usual certificate, and thereafter a deed from the comptroller dated February 16, 1869, which was recorded October 16, 1869. No notice to redeem appears to have been given to the mortgagee or assignee, or to the purchaser at the foreclosure sale.

Geo. W. Cothran for the appellant. The purchaser at the foreclosure sale acquired the rights of both the mortgagor and mortgagee. (3 R. S. [6th ed.], 198, § 101; id., 199, § 102.) The assignee of the mortgage was a mortgagee entitled to notice to redeem from the tax sale. (Laws 1855, chap. 427, § 80; 1 R. S. [6th ed.], 968, § 124.) Plaintiff was entitled to judgment. (Laws 1855, chap. 427, §§ 50, 63, 76, 77, 79; 1 R. S. [6th ed.], 964, § 94; id., 966, § 107; id., 968, §§ 120, 121, 123; id., 969, § 126, and note; 4 Hun, 362.)

Opinion of the Court, per *Curiam*.

Sherman S. Rogers for the respondents. The tax deed passed to respondents the mortgagor's title to and the equity of redemption in the premises. (3 R. S. [Edm. ed.], 367.) The sale passed the fee subject only to the right of the mortgagee to redeem. (*Becker* v. *Howard*, 11 Hun, 359.) The purchaser at the tax sale could not properly be made a party to the foreclosure action. (*Corning* v. *Smith*, 2 Seld., 82; *Eagle Fire Co.* v. *Lent*, 6 Paige, 635; *Banks* v. *Walker*, 8 Barb. Ch., 438; *Merch. Bk.* v. *Tuttle*, 55 N. Y., 7.)

Upon decision of the appeal no prevailing opinion was written; all the court agreed for affirmance, except EARL, J., dissenting. Subsequently a motion for reargument was made, whereupon the following opinion was written:

Per Curiam. The court necessarily decided, in affirming the judgment of the court below, that the plaintiff did not, either as mortgagee or as purchaser under the foreclosure sale, acquire a title to the premises as against the defendants, grantees of the State under a sale for the non-payment of taxes. No other question was involved in or presented by the appeal. An opinion would have been but an elaboration of the reasons leading to the result as declared. The motion for a reargument appears to be chiefly with a view to a settlement of some question which may arise in other pending actions. We would be glad, by one judgment, to put an end to all litigation for the future, but that is impracticable, and we are compelled to decide questions as they arise, and the judgment in this action will only serve as a precedent when the same question is presented, and under similar circumstances. We decided the precise points presented, to wit.: first, that the defendants, by their tax-deed, acquired a valid title to the premises, subject to the right of mortgagees to redeem under the statute; second, that the defendants were not affected by the foreclosure of the mortgage and the sale of the mortgaged premises to the plaintiff; third, that the mortgagee might, at any time within six months after receiv-

Statement of case.

ing notice, redeem the premises from the sale, and that he was not compelled to await the reception of the notice before making the redemption; fourth, that the purchasers at the tax sale were not compelled to give any notice to the mortgagee in order to perfect their title, but could only limit the time within which redemption could be made, by giving the notice prescribed by statute. This statement will probably serve all the purposes of the appellant, and as the questions were thoroughly discussed and considered, a reargument would be fruitless. The motion is therefore denied.

All concur.

Motion denied.

THE PEOPLE ex rel. DAVID WOOLF, Respondents, *v.* AARON JACOBS, Appellant.

In proceedings under the statute for contempt (2 R. S., 534, *et seq.*), the court has jurisdiction to determine the amount of costs and expenses to be imposed as a fine in case the party is adjudged in contempt, and if items are included which ought not properly to be allowed, this is not an excess of jurisdiction and does not render the commitment void.

The action of the court, therefore, cannot in such case be reviewed on *habeas corpus*.

People ex rel. Tweed v. *Liscomb* (60 N. Y., 559) distinguished.

(Argued April 4; 1876; decided April 18, 1876.)

ERROR to the General Term of the Supreme Court in the first judicial department to review an order of a justice of said court discharging, upon writ of *habeas corpus*, defendant from imprisonment under a warrant of commitment issued out of the Superior Court of the city of New York for an alleged contempt in violating an injunction order. (Reported below, 5 Hun, 428.)

It appeared by the return to the writ that defendant was adjudged in contempt; that the court imposed a fine and directed defendant to be imprisoned thirty days, and until the

fine should be paid. In the sum imposed as a fine was included an item of $150 "as a counsel fee," which was claimed to be erroneous.

Samuel J. Crooks for the appellant.

C. Bainbridge Smith for the respondent. The court had no discretion as to the amount of the fine to be imposed. (*Davis* v. *Sturtevant*, 9 N. Y., 263; *People* v. *Compton*, 1 Duer, 512–517.) A reasonable counsel fee may properly be allowed to the aggrieved party under sections 21 and 29 of the Revised Statutes "of proceedings for contempts." (1 Duer, 546; *Davis* v. *Sturtevant*, 4 id., 148, 149.) The allowance of a counsel fee in such a proceeding is not reviewable on a writ of *habeas corpus* (*People* v. *Hackley*, 24 N. Y., 74, 77; Hurd on Hab. Cor., 412.)

RAPALLO, J. The appellant was imprisoned under a commitment for a contempt of court, in violating an order of injunction. The warrant directed him to be detained for thirty days, and also until he should pay a fine imposed upon him by the court. The appellant sued out a writ of *habeas corpus* and claimed to be discharged on the sole ground that in the amount imposed in the fine there was included the sum of $150, for counsel fees in the proceedings to punish the appellant for the contempt.

Proceedings for contempt are regulated by title 13 of chapter 8 of part 3 of the Revised Statutes, which title is retained in force by section 471 of the Code. Section 21 of this title (2 R. S., 538), provides that where the misconduct has produced injury to any party a fine shall be imposed sufficient to indemnify such party and to satisfy his costs and expenses. Section 25 authorizes imprisonment for a term not exceeding six months and until the expenses of the proceeding are paid; and also, if a fine be imposed, until such fine be paid. It is evident that the court has jurisdiction to ascertain and determine the amount of the costs and expenses, and that, if

in determining this amount it includes items which ought not properly to be allowed as costs or expenses, this is merely an erroneous decision on a matter which the law has committed to its judgment, and is not an excess of jurisdiction or power. That such an error cannot render the commitment void, or be reviewed on *habeas corpus* is too plain a proposition to admit of argument.

The case of *People ex rel. Tweed* v. *Liscomb* (60 N. Y., 559) is cited as an authority in support of the proposition of the appellant, that the writ of *habeas corpus* is a proper remedy in such a case. How that decision can have been so misinterpreted it is difficult to comprehend. In respect to the question of the remedy by *habeas corpus*, what is decided in that case is, that where the punishment for a crime is defined and limited by statute and the court has imposed a sentence to the full limit allowed by the statute, it has exhausted its authority in the case, and that if it proceeds to impose further additional sentences the latter are void, and afford no justification for the detention of the prisoner after he has served out the full term of imprisonment which the statute empowered the court to impose upon him, and that he is then entitled to his discharge on *habeas corpus*. This has no analogy to a case when a court empowered by law to ascertain and determine the amount of costs and expenses to be included in a fine, simply makes an erroneous decision as to the allowance of some item. If the court in this case had committed the prisoner for the full term of six months allowed by the statute, and had superadded to that a further commitment for six years, and the prisoner, after having paid his fine and served his six months' imprisonment, had applied to be discharged on *habeas corpus*, the case of *People ex rel. Tweed* v. *Liscomb* might with propriety have been cited as an authority in support of his application.

The judgment of the General Term should be affirmed, with costs

All concur.

Judgment affirmed.

Statement of case.

ELIZABETH ROBINSON, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

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109	22
66	11
111	202
66	11
120	293
66	11
127	660

A female who has accepted an invitation to take a ride with a person in every way competent and fit to manage a horse, is not chargeable with his negligence, and contributory negligence upon his part is no defence to an action against a railroad corporation for injuries resulting from a collision.

Accordingly, *held*, that a charge in such an action that if defendant was negligent and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence, which contributed to the injury, was proper.

Beck v. *East River Ferry Company* (6 Robt., 82) distinguished.

Brown v. *New York Central Railroad Company* (32 N. Y., 597) limited.

(Argued April 6, 1876; decided April 18, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiff, entered upon an order denying a motion for a new trial, and directing judgment on a verdict.

This action was brought to recover damages for injuries resulting from a collision at a railroad crossing between a buggy, in which plaintiff was riding, and a train on defendant's road, alleged to have been caused by the negligence of defendant's employes.

Plaintiff was riding at the invitation of one Conlon in a buggy belonging to him, he being the driver. Conlon was an able-bodied man, and in every way competent to drive and manage the establishment. The court charged the jury that if the defendant was negligent and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence, which contributed to the injury, to which defendant's counsel duly excepted.

A. P. Laning for the appellant.

J. H. Martindale for the respondent. The negligence of the owner and driver of the horse and buggy was not imputable to plaintiff, and would not defeat a recovery. (*Cattlin* v. *Hills*, 65 C. L., 130; *Norton* v. *West R. R. Co.*, 15 N. Y.,

444–447; 19 id., 342; 20 id., 492; 38 id., 260; 45 id., 631; 6 Sup. Ct. R., 66.) The evidence was not sufficient to establish the relation of mistress and servant between plaintiff and Conlon. (*Metcalf* v. *Baker*, 18 Abb. [N. S.], 431.)

CHURCH, Ch. J. The court charged the jury that if the defendant was negligent, and the plaintiff was free from negligence herself, she was entitled to recover although the driver might be guilty of negligence which contributed to the injury.

In determining this question it is important to first ascertain the relation which existed between the plaintiff and Conlon, the driver. It is very clear, and was found by the jury, that the relation of master and servant did not exist. Nor was Conlon, in any sense, the agent of the plaintiff. He had invited the plaintiff to ride to a certain place, which she declined, but stated that if he would come on a specified day she would ride with him to another place where she desired to go for a visit, and it was during that ride that the accident occurred. I do not think that the change affected the relation between the parties. It was the same as if the plaintiff had accepted the first invitation. It is, therefore, the case of a gratuitous ride by a female upon the invitation of the owner of a horse aud carriage. The plaintiff had no control of the vehicle, nor of the driver in its management. It is not claimed but that Conlon was an able-bodied, competent person to manage the establishment, nor that he was intoxicated, or in any way unfit to have charge of it. Upon what principle is it that his negligence is imputable to the plaintiff? It is conceded that if by his negligence he had injured a third person, she would not be liable. She was not responsible for his acts, and had no right and no power to control them. True, she had consented to ride with him, but as he was in every respect competent and suitable, she was not negligent in doing so. Can she be held by consenting to ride with him to guaranty his perfect care and diligence? There was no necessity for riding with him. It was a voluntary act on the part of the plaintiff, but it was not an unlawful or negligent act.

She was injured by the negligence of a third person, and was free from negligence herself, and I am unable to perceive any reason for imputing Conlon's negligence to her.

If his negligence contributed to the injury, he is liable also to an action, but that does not exonerate the defendant. Suppose Conlon had, by grossly negligent driving, turned over the carriage and injured the plaintiff, is there a doubt but he would be liable to an action for the injury in her behalf. These views proceed, of course, upon the assumption that there was no relation of principal and agent, or master and servant. Nor were they engaged in a joint enterprise in the sense of mutual responsibility for each other's acts, as in *Beck* v. *East River Ferry Company* (6 Robertson, 82).

I am unable to find any legal principle upon which to impute to the plaintiff the negligence of the driver. The whole argument on behalf of the appellants on this point is contained in the following paragraph from the brief of its counsel: "So if the plaintiff had proceeded on this journey upon the invitation of Conlon for the like purpose, she having voluntarily intrusted her safety to his care and prudence, and thus exposed herself to the risk of injury arising from his negligence or want of skill, she should be precluded from recovering, if he thereby contributed to her injury." If this argument is sound why should it not apply in all cases to public conveyances as well as private? The acceptance of an invitation to ride creates no more responsibility for the acts of the driver than the riding in a stage-coach, or even a train of cars, providing there was no negligence on account of the character or condition of the driver, or the safety of the vehicle, or otherwise. It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury, for whose acts the plaintiff was not responsible. The rule of contributory negligence is very strict in this State, and should not be extended, nor should the rule of imputable negligence be extended to new cases where the reason for its adoption is not apparent.

I have examined all the authorities cited, and none of them

sanction the application of the principle to the facts of this case. It was stated in *Brown* v. *New York Central Railroad Company* (32 N. Y., 597), which was the case of a passenger in a stage-coach, that a majority of the judges were of opinion that the negligence of the driver was imputable to the passenger, but the point was not decided, as it was found in that case that the driver himself was not negligent. (38 N. Y., 260.) That case had the element of employment in it which makes it stronger than this in that respect, but the opinion said to have been entertained was not adopted, and cannot have the weight of authority. It is not intended by this decision to establish a rule which will embrace cases not within the facts developed in this case, as construed by the court and found by the jury.

The judgment must be affirmed.

All concur; ALLEN and EARL, JJ., taking no part.

Judgment affirmed.

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110 475
110 476

66 14
115 301

66 14
149 536

EVERT EVERTSON, Respondent, *v.* THE NATIONAL BANK OF NEWPORT, Appellant.

Interest coupons to railroad bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and are subject to the same rules as other negotiable instruments. They are transferable by delivery, although detached from the bonds, and a purchaser, in good faith before maturity, from one who has stolen them acquires a valid title.

The fact that by their terms they are declared to be for interest upon bonds specified by their numbers does not destroy their negotiability when separated from the bonds, or impair the title of one purchasing from another without production of the bonds.

Such instruments are entitled to days of grace; and one purchasing after the expiration of the time of payment specified, but before the expiration of the days of grace, is a purchaser before maturity.

Where, however, interest coupons or warrants to such bonds are not made payable to bearer or order, they are not negotiable when separated from the bonds, although the latter are themselves negotiable, and a purchaser of these detached instruments takes them subject to all defects in the title of his transferrer, and therefore subject to the claims of the true owner in case they have been stolen.

Statement of case.

As to whether the parties to an instrument can give it a negotiable character with all the incidents pertaining to negotiable paper when it is not, in terms, within the class of instruments known in the law as negotiable, *quære.*

Myers v. *York and Cumberland Railroad Company* (43 Me., 232) and *Jackson* v. *Same* (48 id., 147) disapproved.

Smith v. *Clark Company* (54 Mo., 58); *McCoy* v. *Washington Company* (3 Wall., Jr., 381) distinguished and limited.

Evertson v. *National Bank* (4 Hun, 692) reversed.

(Argued April 6, 1876; decided April 18, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 4 Hun, 692.)

This action was originally brought against the Indianapolis, Bloomington and Western Railway Company, to collect ten coupons each for the semi-annual interest due April 1, 1871, on a $1,000 bond issued by said corporation, also to collect forty-seven "interest warrants," so called, for semi-annual interest due at the same time upon bonds which said corporation was obligated to pay. The present defendant having made claim to the interest so due and to the instruments, was, by an order of interpleader, substituted as defendant, the corporation paying into court the amount due.

The form of the coupons was as follows:

"$35 THE INDIANAPOLIS, BLOOMINGTON AND WESTERN $35
RAILWAY COMPANY

will pay the bearer, at its agency in the city of New York, thirty-five dollars, in gold coin, on the 1st day of April, 1871, for semi-annual interest on bond No. —.

"A. P. LEWIS,
"*Secretary.*"

The form of the warrants was as follows:

"$35 INTEREST WARRANT FOR THIRTY-FIVE DOLLARS $35

upon bond No. — of the Danville, Urbana, Bloomington and Pekin Railroad Company. Payable in gold coin at the office

Statement of case.

of the Farmers' Loan and Trust Company in the city of New York, April 1, 1871.

"W. J. ERMENTROUT,
"*Secretary.*"

In each coupon and warrant the blank for No. — was filled with the number of the bond to which it was attached. The bonds, with the coupons and warrants attached, were owned by defendant. The coupons and warrants were detached and sent to New York by express March 31, 1871, for presentation and payment, and on that day they were stolen from the express office, and were purchased by plaintiff at Albany, April 3, 1871.

The referee found that plaintiff was entitled to judgment for the whole amount claimed, and judgment was perfected accordingly.

Samuel Hand for the appellant. A paper neither payable to order or bearer nor containing words of similar import showing the makers intended to give it currency is not negotiable. (*Jackson* v. *York. etc., R. R. Co.*, 48 Me., 147; *Wright* v. *O. and Miss. R. R. Co.*, 1 Disney [O.], 465; 1 R. S., 768, § 1; Story on Notes, § 44; *Meyer* v. *Y. and C. R. R. Co.*, 43 Me., 232; *Douglass* v. *Wilkeson*, 6 Wend., 637; *Texas* v. *White*, 7 Wall., 700; *Thomas* v. *Kinsey*, 8 Ga., 44; *Weatherhead* v. *Smith*, 9 Tex., 622; *Chester* v. *Dorr*, 41 N. Y., 279; Edwards on Bills, 131; *Ball* v. *Allen*, 15 Mass., 433; 13 id., 158; *Cory* v. *Davis*, 14 C. B. [N. S.], 370; *Cowie* v. *Sterling*, 6 E. & B., 333.)

Nathaniel C. Moak for the respondent. Bonds issued by a corporation under its seal are negotiable securities and pass by delivery. (*Dinsmore* v. *Duncan*, 57 N. Y., 577; *Brainard* v. *N. Y., etc.*, 25 id., 496; *Lindsley* v. *Diefendorf*, 43 How. Pr., 357; *Blake* v. *Bd. Supvrs.*, 61 Barb., 149; *Moran* v. *Comrs.*, 2 Black., 722; *Mercer Co.* v. *Hackett*, 1 Wall., 83; *Gilpeke* v. *Dubuque*, id., 176; *Clapp* v. *Cedar Co.*, 5 Iowa, 15; *King* v. *Johnson Co.*, 6 id., 265; *In re Imperial, etc.*,

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L. R., 11 Eq., 478; 7 Am. L. Rev., 71; *Huidekoper* v. *Buchanan Co.*, 1 Cent. L. J., 177.) A *lis pendens* will not prevent a *bona fide* purchaser from obtaining a good title to such securities. (*Holbrook* v. *N. J., etc.*, 57 N. Y., 616; *Leitch* v. *Wells*, 40 id., 585; *Lindsley* v. *Diefendorf*, 43 How., 357; *Durant* v. *Iowa City*, 1 Woolw., 69.) Coupons issued with such bonds, after being detached, are treated as bank bills and currency, and may be sued, though the owner be not the holder of the bond. (*Spooner* v. *Holmes*, 102 Mass., 507; 6 Alb. L. J., 235; *Clark* v. *Iowa City*, 20 Wall., 583; *Town of Queensbury* v. *Culver*, 19 id., 84; *New London, etc.*, v. *Ware River, etc.*, 41 Conn., 542; *Nat. Ex. Bk.* v. *Hartf, etc.*, 8 R. I., 375; *City of Memphis* v. *Brown*, 5 Am. L. T. R., 433; 7 Am. L. Rev., 71; *Sewell* v. *Brainard*, 38 Vt., 364; *Miller* v. *R. W. and O. R. R. Co.*, 40 id., 399; *Wohey* v. *Pole*, 4 B. & Ald., 1; *Murray* v. *Lardner*, 2 Wall., 110; *Langston* v. *So. Car. R. R. Co.*, 2 S. C. R. [N. S.], 248; *Comm.* v. *Em. Indust., etc.*, 98 Mass., 12; *Hav.* v. *G. J. R. R. Co.* 109 id., 88; *City of Lexington* v. *Butler*, 14 Wall., 82; *McCoy* v. *Wash. Co.*, 3 Wall., Jr., 381; *Gorgier* v. *Mulville*, 4 D. & R., 641; *Spooner* v. *Holmes*, 102 Mass., 507; *Smith* v. *Clark Co.*, 54 Mo., 58.) Plaintiff having purchased the coupons in good faith and for a full consideration, acquired a valid title. (*Raphael* v. *Gov., etc.*, 17 C. B., 161; *Miller* v. *Race*, 1 Burr., 462; *Worcester, etc.*, v. *Dorchester, etc.*, 10 Cush., 488; *Anon*, 1 Salk., 126; *Snow* v. *Latham*, 2 C. & P., 314; *Wyer* v. *Dorchester, etc.*, 11 Cush., 51; *Birdsall* v. *Russell*, 29 N. Y., 220; *Dutchess Co.* v. *Hackfield*, 1 Hun, 675; *Chapman* v. *Rose*, 56 N. Y., 140; *Seybel* v. *Nat., etc.*, 54 id., 288; *Welch* v. *Sage*, 47 id., 143; *Mages* v. *Badger*, 34 id., 247; *Belmont Bk.* v. *Hoge*, 35 id., 65; *Hotchkiss* v. *Bank*, 21 Wall., 354; *Head* v. *Smith*, 44 How. Pr., 478; *Cothran* v. *Collins*, 29 id., 113; *Comstock* v. *Hannah*, 76 Ill., 531; *Leavitt* v. *Dabney*, 7 Rob., 350; *Murray* v. *Lardner*, 3 Wall., 111; *Bk. of Bengal* v. *McLeod*, 7 Moore P. C., 35; *Bk. of Bengal* v. *Fagan*, id., 61; *Goodman* v. *Simonds*, 20 How. [U. S.], 366; *Hamilton* v. *Vought*, 34 N. J. L. R., 187;

Phelan v. *Moss*, 67 Penn. St., 59; *Greve* v. *Schweitzer*, 36 Wis., 556.)

ALLEN, J. But two questions are presented upon this appeal: First, whether the instruments which are the subjects of the controversy are negotiable promises for the payment of money, and therefore subject to the same rules as bank bills or other negotiable instruments, so that one who acquires title in the usual course of business and in good faith, although from one who has obtained them feloniously, may withhold them from the true owner; and secondly, whether they were dishonored at the time of the purchase of them by the plaintiff.

The rule of *caveat emptor* does not apply to negotiable instruments payable in money and to the bearer; and a purchaser in good faith from one who has stolen them acquires a valid title. (*Spooner* v. *Holmes*, 102 Mass., 503; *Birdsall* v. *Russell*, 29 N. Y., 220.)

The coupons of the Indianapolis, Bloomington and Western Railway Company are, in terms, distinct promises to pay the bearer the amount specified therein at a day and place named, and are, within the authorities, promissory notes for the payment of money to the holder, and transferable by delivery, although detached from the bonds to which they refer. The fact that they are declared to be for interest upon bonds specified by their numbers, does not destroy their negotiability when separated from the bond, or impair the title of one purchasing from another without production of the bond. The bonds themselves, although under the seal of the company, are negotiable instruments within the repeated decisions of our courts. (*White* v. *V. and M. Railroad Co.*, 21 How. [U. S.], 575; *Gelpcke* v. *Dubuque*, 1 Wall, 175; *Clark* v. *Iowa City*, 20 id., 583; *Brainerd* v. *New York and Harlem Railroad Co.*, 25 N. Y., 496; *Dinsmore* v. *Duncan*, 57 id., 573; *Haven* v. *Grand Junc. Railroad and Depot Co.*, 109 Mass., 88.) The cases of *Myers* v. *York and Cumberland Railroad Company* (43 Me., 232) and *Jackson* v. *The Same*

(48 id., 147), holding somewhat different doctrines, cannot be regarded as authority.

The coupons of the Danville, Urbana, Bloomington and Pekin Railroad Company, termed upon their face "interest warrants," are in somewhat different form. Whether they are within that description of property to which a title may be acquired by a *bona fide* transferree for value, notwithstanding a defect of title in the transferror, depends upon their negotiability. If they are not negotiable instruments, and as such representatives of money, the plaintiff acquired no better title than the party from whom he purchased them had; *i. e.*, he took them subject to all the defects of his title and subject to the claims of the true owner. The instruments are not, upon their face, negotiable; they are not payable to any person by name, or his order, or to the bearer, or to the order of a fictitious person. In all the cases to which reference has already been made, the coupons contained distinct promises to pay the bearer the sums named therein at a time and place specified. They were perfect negotiable instruments, independent of the bond from which they had been severed, and were not only negotiable within the statutes upon that subject and the Law Merchant, but were intended by the parties to be negotiable. The negotiability of instruments depends somewhat upon statute. The statute of this State (1 R. S., 768) embodies, substantially, the law, and declares, as understood at the time, what instruments shall be negotiable. To bring an instrument within this statute there must be a promise to pay to the order of the maker, or some other person or his order, or to the order of a fictitious person, or to the bearer, a sum certain absolutely. Whether the parties to an instrument can give it a negotiable character with all the incidents pertaining to negotiable paper, when it is not in terms within the class of instruments known to the law as negotiable, may be questioned. (*Crouch* v. *Credit Foncier of England*, L. R., 8 Q. B., 374.)

It is for the interest of corporations issuing bonds for the payment of money that they should be negotiable; and they

are, ordinarily, made so upon their face; and such bonds, as well as the coupons attached thereto, have been held negotiable when payable to bearer; for the reason that they are promises to pay money in the form which, by the Law Merchant, would make them negotiable as representatives of money, the same as ordinary commercial instruments. (*In re Imperial Land Company of Marseilles*, L. R., 11 Eq. Cases, 478.) While it may be for the interest of the company issuing bonds, with a view to their ready negotiation, that they should be negotiable by delivery, there may not be the same reasons for making the coupons for the installments of interest negotiable when detached from the bonds. The object of the interest warrants before us may be fully accomplished by regarding them as authority to the financial agent of the company to pay the amount named therein upon presentation, although detached from the bonds. It is possible that as between such agent and the debtor corporation the possession and presentment of the interest warrants at maturity would be evidence of an authority to receive the money by the person presenting it, even as against the true owner. But if this be conceded, it does not make them negotiable as between third persons. In this, as in other contracts, its negotiability depends upon its terms; and the rule is, with certain exceptions not applicable to this case, that in instruments for the payment of money, if no one be designed as payee, either by name or as bearer, the instrument is not a promissory note. If these warrants are not promissory notes they are not negotiable; they are neither checks nor bills of exchange. (1 Parsons on Bills, 33, and note; *Brown* v. *Gilman*, 13 Mass., 158; *Gibson* v. *Minet*, 1 H. Bl., 569; *Douglass* v. *Wilkeson*, 6 Wend., 637; *Walrad* v. *Petrie*, 4 id., 575.) In the latter case Judge MARCY was inclined to sustain the action upon the instrument as a promissory note, but was reluctant to establish a different rule here from that which seemed to prevail in England, regarding it as important that the statutes, which were alike in both countries as to negotiable paper, should receive the same construction and be applied in the same man-

ner. In a case like the present it would be unwise, in deference to any supposed intent of the parties or public convenience, to depart from the ordinary rules of construction, and give a different effect to different contracts, the same in form and substance. Checks payable to "the order of bills payable," or to something impersonal in its character, are regarded as payable to the order of a fictitious person, and therefore within the statute payable to the bearer; and bills and notes payable to the order of one not named but capable of being ascertained, have been also held negotiable within the statute. (*Willets* v. *The Phœnix Bank*, 2 Duer, 121; *Stevens* v. *Strang*, 2 Sand. S. C. R., 138; *United States* v. *White*, 2 Hill, 59.) An instrument payable "to the estate of M. L., deceased," is held not to be a promissory note. (*Lyon* v. *Marshall*, 11 Barb., 241.) In *Partridge* v. *The Bank of England* (9 Q. B., 396) dividend warrants in the form of checks, payable to a particular person, without words making them transferable, were held not transferable by the Law Merchant. Two cases are relied upon by the learned counsel for the respondent, in support of his position that these interest warrants were negotiable and within the protection accorded by the Law Merchant to negotiable paper. (*Smith* v. *Clark Co.*, 54 Mo., 58; *McCoy* v. *Washington Co.*, 3 Wall., Jr., 381.) In the case first cited the principal, and the only question really considered by the court, was as to the power of the county to issue the bonds. The only notice taken by the court of the point now made was in the remark that the question was settled by the case referred to, reported in 3 Wallace, Jr. That case involved other questions, and this was only incidentally made, and was wholly immaterial for the reason that the party claiming to recover upon the coupons produced the bonds upon the trial. Judge GRIER, in his instructions to the jury, charged them that the possession of the coupons was *prima facie* evidence of ownership of the bond.

The contract embodied in these interest warrants, so far as any contract can be implied, cannot, upon principle or within any well-considered authority, be made an exception to the

general rules by which the negotiability of promises for the payment of money is determined. There is no usage or custom proved that would give these warrants a negotiable character, even if custom and usage so recent as one applicable to these instruments would be, could change their legal effect. The plaintiff, therefore, acquired no better title to them than his vendor had and could convey, and the transaction was the same in legal effect as the purchase of any article of merchandise from one having no title or authority to sell.

The coupons of the Indianapolis, Bloomington and Western Railway Company, being promissory notes, they necessarily had all the characteristics of such instruments, and were entitled to the benefit of the days of grace allowable on bills and notes payable at a given day or on time. Having every other quality they cannot be excepted from the general rule which, by commercial usage, sanctioned by law, is applied to every instrument, negotiable in its character, coming within the ordinary definition of bills of exchange or promissory notes. (Story on Bills, § 342; Story on Promissory Notes, § 215; *Hodges* v. *Shuler*, *supra*.) In the case last cited, the bond itself, to which interest warrants had been attached, was presented at maturity, on the third day of grace, at the place of payment, and upon payment being refused the defendants, as indorsers, were notified of the dishonor, and the court held that they were properly charged; all the judges agreeing that the instrument in suit was a promissory note. It does not seem to have been doubted, that, being a promissory note, although something more, it was within the rule allowing days of grace to commercial instruments of that character. If the coupons were not, for the purposes of days of grace, as as well as for other purposes, promissory notes, but were payable at a day certain without grace, then, at the time of the purchase by the plaintiff, they were overdue, and the holder conveyed no better title to the plaintiff than he had himself. (*Chester* v. *Dorr*, 41 N. Y., 279.) It is probably true that they are regarded and treated as well by promisor as promisee as payable at the day, and paid as if, in terms, pay-

able without grace; but this cannot destroy the character or change the legal effect of the instruments, the interpretation of which is for the courts. It is only as negotiable commercial paper that the plaintiff, as a *bona fide* purchaser, could acquire a good title to the coupons from one having no title thereto; and he can only acquire such title by a purchase under the same circumstances that would give him a title to other commercial paper; and if there were no days of grace for the payment of these coupons they could not be transferred so as to give a good title. Upon the findings the plaintiff acquired a good title to the ten coupons, but for the error as to the other coupons, the judgment must be reversed.

Judgment must be reversed and a new trial granted.

All concur.

Judgment reversed.

Isaac McNeilly, Administrator, etc., Respondent, *v.* The Continental Life Insurance Company, Appellant.

One who has dealt with an agent in a matter within the agent's authority has a right to assume, if not otherwise informed, that the authority continues, and, unless notice of revocation is brought home to him, the principal is bound if the dealings continue after the authority is revoked.

Plaintiff's intestate, I., procured a policy of life insurance from defendant through W., its general agent. The premiums were paid semi-annually to W., who received and remitted them to defendant. The agency of W. terminated in May, 1874, save to receive and forward such premiums as should be paid to him thereafter. Defendant in June, 1784, sent a notice to I. that a premium on his policy would fall due on the twenty-second. Across the face was stamped the words "Remit direct to the home office." I. sent to W. a P. O. order for such premium. He had previously paid in the same manner and no objection had been made. W. was absent from home, but his daughter, in accordance with his instructions, wrote I. that her father would send receipt on his return. He returned home after the time for payment by the terms of the policy had expired, drew the money on the order and forwarded it to defendant, who refused to accept. *Held*, that the evidence of notice of the revocation of the agent's authority at most

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raised a question of fact for the jury; that it was no objection that the payment was by P. O. order; and that the authority given by W. to his daughter to receive premiums falling due in his absence was within the general scope of his authority, and payment to her was payment to him.

Upon the back of the policy was printed a notice to the policyholders that payment to agents would not be deemed valid unless a receipt, signed by certain specified officers of the company, was received at the time. *Held*, that this was not a limitation of the power of a general agent, and payment to him was valid without a receipt; also that, as at the time when W.'s general agency terminated he returned all receipts in his hands and was authorized to receive premiums thereafter without having receipts in advance furnished him, this was a waiver of the instructions contained in the notice.

(Argued April 6, 1876; decided April 18, 1876.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing an order nonsuiting plaintiff on trial, and granting a new trial.

This action was brought upon a policy of life insurance issued by defendant upon the life of plaintiff's intestate, Isaac McNeilly.

The policy was issued June 22, 1870. It was obtained through one E. D. Weller, who, at the time, was general agent of defendant. To him the insured paid the premiums as they fell due up to December 22, 1873, receiving receipts therefor. By the terms of the policy the premiums became due and payable semi-annually on the twenty-second of June and December, or within thirty days thereafter. By the terms of Weller's agreement with defendant his agency expired May 26, 1874, and at that time he surrendered up the receipts then held by him, he having authority, however, and agreeing to receive and forward any premiums paid to him. Prior to June 22, 1874, defendant sent to the insured a notice by mail advising him that the premium fell due on the twenty-second of June. Across the face of the notice was stamped the words "Remit direct to the home office." It did not appear when the insured received this notice. On the 16th July, 1874, the insured mailed to Weller a postal order

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payable to him for the amount of the premium. He had been accustomed to pay the premiums in the same manner, and they had been received without objection. At the time this order was received Weller was away from home. It was received by his daughter in accordance with instructions from her father, and she wrote the insured, acknowledging receipt and stating that a receipt would be sent upon return of her father. He returned home July twenty-seventh or twenty-eighth, drew the money on the order, and procured a new order for amount, which he forwarded to defendant. Defendant wrote to the insured informing him of the receipt of the money, and stating as the premium was past due it would not accept it unless he would sign and return a certificate of health inclosed, and that meanwhile it would hold the draft or order subject to his order. The insured informed defendant that he could not sign the certificate, as he had been for some months in failing health. In September defendant inclosed to the insured the order received by it from Weller, who returned it. Upon the back of the policy was printed a notice to policyholders, to the effect that no payment to an agent was valid without the production and delivery by him of a receipt signed by the president, secretary or actuary of the company. The insured died October 5, 1874.

At the close of the evidence on the trial defendant's counsel moved for a nonsuit, which was granted. Plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term. Further facts appear in the opinion.

Charles J. Bissell for the appellant. Non-payment of the premium upon the day it fell due avoided the policy. (*Howell* v. *Knick. L. Ins. Co.*, 44 N. Y., 276; *Russ* v. *Mut. B. Ins. Co.*, 23 id., 515.) The authority of an agent is terminated upon revocation of such authority and notice to the parties who have dealt with him. (2 Kent's Com. [9th ed., m. p.] 644, 645; *Vail* v. *Judson*, 4 E. D. S., 165.) The condition on the back of the policy was a part of the policy itself.

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(*Murdock* v. *Chenan. Co. Mut. Ins. Co.*, 2 N. Y., 210; *Williams* v. *Wash. Ins. Co.*, 31 Iowa, 541.) The fact that the notice that the premium was due was sent by mail is presumptive evidence that the deceased received it by due course of mail. (1 Phil. on Ev. [5th ed., m. p.], 645, note 7; 1 Greenl. on Ev. [7th ed.], 53, § 40, notes 2 and 3.) Payment by post-office order could not operate as a payment of the premium. (*Olcott* v. *Rathbone*, 5 Wend., 491; *Bradford* v. *Fox*, 38 N. Y., 289; *Smith* v. *Miller*, 6 Abb. [N. S.], 234; *Busby* v. *N. Am. L. Ins. Co.*, 4 Big. Ins. R., 117; *Bouton* v. *Am. Mut. L. Ins. Co.*, 25 Conn., 542; *Fellows* v. *Northrup*, 39 N. Y., 117; *Lewis* v. *Ingersoll*, 3 Abb. Ct. App. Dec., 55; *Contl. L. Ins. Co.* v. *Willett*, 24 Mich., 268.)

A. M. Bingham for the respondent. The deceased was not required to spell out the termination of Weller's agency by implication, but was entitled to a clear and express notice of it. (*Fellows* v. *Hartf. and N. Y. Stbt. Co.*, 38 Conn., 197; *Bap. Ch.* v. *Bklyn. F. Ins. Co.*, 19 N. Y., 305; *Prest. W. Bk.* v. *Carner*, 37 N. Y., 320.) Slight evidence of a waiver of a forfeiture in an insurance policy will be sufficient to avoid a forfeiture of the contract. (*O'Reily* v. *G. M. L. Ins. Co.*, 3 Sup., 453; *Young* v. *Mut. L. Ins. Co.*, 4 Big. Ins. Cas., 1.) Weller was, as to the deceased, a general agent, and had power to waive the company's directions and receive the premiums. (*Howell* v. *Knick. L. Ins. Co.*, 44 N. Y., 276; *Bohen.* v. *Wmsb. Ins. Co.*, 35 id., 131; 46 id., 526; *Ins Co.* v. *Colt*, 20 Wall., 560; *Goit* v. *Nat. Pro. Ins. Co.*, 25 Barb., 189; *Mayers* v. *Mut. L. Ins. Co.*, 4 Big. Ins. Cas., 62; *Bortine* v. *Ex. F. Ins. Co.*, 51 N. Y., 117.) The neglect of Weller to forward the premium to the company before it became due is not chargeable to the deceased. (*N. Y. and N. H. R. R. Co.* v. *Schuyler*, 34 N. Y., 30; *Fahrenkrag* v. *Ecl. L. Ins. Co.*, 4 Big. Ins. Cas., 42; *Ins. Co.* v. *Colt*, 20 Wall., 560; *Goit* v. *Nat. Pro. Ins. Co.*, 25 Barb., 189; 13 Alb. L. J., 80.)

Opinion of the Court, per Andrews, J.

Andrews, J. When the policy was issued Weller was the general agent of the defendant, and was authorized to take applications for insurance, appoint local agents, and receive original, or renewal premiums on policies issued by the company. In 1870 he took the application for insurance upon the life of the plaintiff's intestate, and the policy was issued June 22, 1870, countersigned by Weller as general agent. By the terms of the policy the premium was payable on the twenty-second day of June in each year, or within thirty days thereafter, and prior to 1874, premiums had been paid semi-annually to Weller, who received and remitted them to the defendant, and the company forwarded to Weller receipts therefor, which he delivered to the insured. On the 16th day of July, 1874, the insured mailed to Weller a postal money order for the semi-annual premium which fell due June 22, 1874. Weller was then absent from home, but his daughter, pursuant to his instructions, received the order, and informed the insured by letter that her father would send a receipt on his return. He returned home on the twenty-seventh or twenty-eighth of July, and drew the money on the order sent by the insured, and procured an order on the New York office for the amount of the premium, and sent it to the defendant. The defendant, on receiving the order, wrote the insured informing him of its receipt, and inclosing in the letter a certificate of health, and stating, in substance, that as the premium was past due the company would not accept it, except on condition that he would sign and return the certificate, and that, meanwhile, it would hold the draft subject to his order. The insured had, for several months, been in failing health, and he informed the defendant that he could not for that reason make the statement contained in the certificate. Afterward, in September, the defendant returned the order to the insured, who again sent it to the company, and in October, of the same year, the plaintiff's intestate died.

The defence interposed by the company is that the policy was forfeited by the non-payment of the June premium. It was sent to Weller within the thirty days extension of time

given by the policy. The defendant, to avoid the effect of this payment, relies upon the fact that the general agency of Weller terminated in April, and that notice was given to the insured, before the payment was made, to send the premium directly to the company.

A person who has dealt with an agent in a matter within his authority, has a right to assume, if not otherwise informed, that the authority continues, and when the dealing continues after the authority is revoked, the principal is nevertheless bound, unless notice of the revocation is brought home to the other party. (Story on Ag., § 470.) It was, therefore, essential for the defendant, in order to defeat the action, to show that the plaintiff's intestate, when he made the payment to Weller, in July, 1874, had notice that he was not authorized to receive it. To establish this the defendant proved that, early in June, it mailed to the insured a notice that the premium on his policy would fall due on the twenty-second of that month. This notice was partly printed and partly written, and across its face was stamped the words, "remit direct to the home office." When this notice was received by the insured does not appear. It was seen in his possession in August. This is all the evidence there is to show that the insured, when he sent the money-order to Weller in July, knew that his authority was terminated. This evidence, at most, raised a question of fact for the determination of the jury. The notice made no reference to Weller, nor did it indicate that his agency had terminated. It is evident that he did not so understand it, for he had abundant time to have remitted the premium to the defendant's office, if he had supposed that Weller had no right to receive it. Nor did the direction on the notice to send to the home office operate as notice of a special limitation of the previous authority vested in Weller. The direction was printed on a blank prepared for general use. The general direction to send to the home office would not fairly imply that payment to a general agent was prohibited. If it would convey to any one any intimation of this kind, it would not be likely to do

so to persons unskilled in business, with whom, to a great extent, the business of life insurance companies is conducted. The language is, at least, vague and equivocal to convey the information claimed, and it is not too much to require that the defendant shall make a plain case when it claims a forfeiture. The objection that the money was remitted by post-office draft, is not tenable. The insured had paid his premiums in this way before, and Weller had accepted them as a good payment, and the company made no objection on this ground. The authority given by Weller to his daughter to receive premiums falling due in his absence, was within the general scope of his agency, and payment to her was payment to him. The notice to policy-holders printed on the back of the policy, that payment to agents would not be deemed valid, unless a receipt, signed by the president, secretary, or actuary of the company was taken at the time, cannot be construed as a limitation of the power of a general agent. It was not a part of the contract of insurance, and payment to a general agent without the production of a receipt, is valid. (*Boehen* v. *Williamsburgh City Ins. Co.*, 35 N. Y., 131; *Sheldon* v. *The Atlantic Ins. Co.*, 26 id., 460; *Shearman* v. *The Niagara Ins. Co.*, 46 id., 526.) There is another answer to this objection. The agency of Weller, under his contract with the company, terminated on the 26th day of May, 1874, and on that day all receipts in his hands were delivered by him to the company. But his agency was continual for a special purpose, viz., to receive such premiums as should be paid to him thereafter, and forward them to the defendant, and under this authority he continued to receive premiums falling due, until October, and sent them to the company pursuant to the arrangement. No receipts in advance were furnished to deliver to the persons paying the premium, nor was it contemplated that this should be done when the special authority was given to Weller. The claim, that Weller's special authority, after the termination of his general agency, was confined to receiving premiums in cases where receipts were furnished him in advance, is not, we think, supported by the proof. Upon the

ground, therefore, of a special waiver by the company of the instruction contained in the notice to policyholders, the payment made by the plaintiff's intestate was valid.

It is not claimed that the nonsuit can be supported upon any grounds other than those we have considered, and for the reasons stated we are of opinion that they do not justify the direction given at the Circuit.

The order appealed from should be affirmed, and judgment absolute ordered for the plaintiff on the stipulation.

All concur; ALLEN and EARL, JJ., on last ground.

Order affirmed, and judgment accordingly.

GEORGE C. MAGOUN et al., Appellants, *v.* FRANCIS S. SINCLAIR et al., Respondents.

Plaintiffs discounted certain bills of exchange drawn by defendants upon A. & N., of Liverpool, secured by bills of lading of shipments of corn consigned to A. & N. under an agreement that if the bills of exchange were accepted by the drawees and the acceptances were satisfactory to plaintiffs' correspondents, the bills of lading were to be delivered up to the consignees. If the bills of exchange were not accepted, or if the acceptances were not satisfactory, said correspondents were authorized to place the corn in the hands of brokers, to be selected by them, for sale, the proceeds to be applied to pay the bills of exchange. The consignees, after the arrival of the corn, and before the maturity of the said bills, had contracted for its sale through C. & Co., brokers. When the bills reached Liverpool they were presented and accepted, plaintiffs' correspondents, however, retaining the bills of lading. The consignees procured and filled out blanks for undertakings, which were signed by C. & Co., by which, in substance, they agreed to hold the bills of lading and the corn in trust to secure the payment of the bills of exchange and to apply the proceeds for that purpose. Each of these undertakings were indorsed "The within engagement signed at our request," which was signed by A. & N. Upon receipt thereof plaintiffs' correspondents delivered up the bills of lading to C. & Co., who sold the corn, misapplied the proceeds, and thereafter failed. In an action upon the bills of exchange, *held*, that it was to be inferred that plaintiffs' correspondents were not satisfied with the acceptances; that the acceptors could, within the terms of the agreement, make the acceptances satis-

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factory in any of the usual modes, of which it appeared that the giving of such undertakings was one; that the indorsements upon the backs thereof were equivalent to requests on the part of A. & N., plaintiffs' correspondents, to deliver the bills of lading to C. & Co. upon receipt of the undertakings; that C. & Co. were the brokers of A. & N., and a delivery of the bills of lading to the former was in effect a delivery to the latter, and that defendants were liable.

(Argued April 6, 1876; decided April 18, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York affirming a judgment in favor of defendants, entered upon a verdict.

This action was brought upon three bills of exchange drawn by defendants upon Adlington & Nicholson, of Liverpool, payable in London at sixty days after sight.

The defendants, Sinclaire & Marvin, the drawers of the bills, were merchants doing business in New York, and were engaged in buying and shipping corn from this country to Liverpool. Adlington & Nicholson, the drawees of the bills, were merchants in Liverpool, and the sole agents and correspondents, or consignees, there of the defendants. In May, 1872, Sinclaire & Marvin made shipments of corn by the steamers "Canada," "Caspian," and "Republic," consigned to Adlington & Nicholson, and receiving bills of lading therefor. They then drew the bills of exchange in question, which plaintiffs discounted, the bills of lading being attached as collateral security. The plaintiffs were bankers, and it was in the course of their business to buy exchange with collaterals of the character described, and they, in discounting these bills of exchange, required of Sinclaire & Marvin, in each case, another document called a letter of hypothecation. These letters of hypothecation were signed by Sinclaire & Marvin; they bear the same date as the several bills of exchange; they were addressed to plaintiffs' correspondents, McCalmont Bros. & Co., in London. They recited the sale of the bills of exchange to plaintiffs, against the shipments

named, and they authorized the giving up the bills of lading to acceptors, if their acceptance should be satisfactory. If the drawees declined to accept, or if their acceptance was not satisfactory, then McCalmont Bros. & Co. were authorized to place the bills of lading in the hands of their own brokers, for sale, on account of whom it might concern. The plaintiffs at once forwarded the bills of exchange, with the bills of lading and letters of hypothecation, to McCalmont Bros. & Co. McCalmont Bros. & Co. received the documents in due course of mail, and as the drawers were in Liverpool and the shipments were made to Liverpool, the papers were all forwarded from London to C. Saunders & Co., the agents of McCalmont Bros. & Co. in Liverpool. The several bills of exchange were presented to the drawees at Liverpool, for acceptance, and were duly accepted by them on the twenty-fifth, twenty-seventh and twenty-eighth days of May, respectively, payable at a banking-house in London, sixty days after acceptance. The corn also arrived at Liverpool at about the same dates. After its arrival, Adlington & Nicholson, through Campbell & Co., brokers, contracted for its sale. No demand was made by the acceptors upon the agents of plaintiffs for the corn or the bills of lading. Mr. Adlington testified that on the arrival of the several vessels with shipments, against which the said bills of exchange were drawn, he sent to Campbell & Co. "forms of undertaking to hold the proceeds of the sale of such shipments, to secure the payment of said bills of exchange, for signature;" of one of which undertakings the following is a copy:

"Messrs. McCalmont Brothers & Co., London, per C. Saunders & Co., Liverpool. (Stamp: Adlington & Nicholson, Liverpool.) In consideration of receiving from you bill of lading for 7,116 bags — 21,199 bushels Indian corn, ex 'Canada,' $ New York, held by you as security for payment of Adlington & Nicholson's acceptance of Sinclaire & Marvin's draft for £3,000 9*s.* 8*d.*, due twenty-seventh July, we hereby engage to hold said bill of lading, the property therein represented, and the net proceeds thereof, in trust, to

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secure the payment of the said bill; and we undertake, in case any part of the bill be not paid at maturity, to realize immediately so much of the property as may be required to liquidate said bill; and we acknowledge it to be our full understanding and agreement that till said bill be paid we will not part, except to the purchasers thereof, in accordance with the customary course of business, with said bill of lading and property for any purpose whatever, but will retain the entire control of them, except as aforesaid; and, further, that we will specifically apply the proceeds of all sales, immediately on their receipt, to the liquidation of the said bill, until full satisfaction thereof. We further undertake to insure the said property against all fire risks, and, in the event of loss, to apply the insurance money in like manner as the proceeds of sales. Liverpool, 27th May, 1872.

"CHARLES CAMPBELL & CO."

Adlington & Nicholson indorsed each of these undertakings thus:

"The within engagement given at our request.

"ADLINGTON & NICHOLSON."

These undertakings signed by Campbell & Co. were delivered to Saunders & Co., who thereupon delivered to Campbell & Co. the bills of lading, and took back a receipt for the same, indorsed upon the undertakings. Adlington testified that "the usual course of trade was followed in these transactions." Campbell & Co., after procuring the bills of lading, delivered the corn to the purchasers, pursuant to the contracts of sale, collected the proceeds of sales, but misappropriated them, and failed; the bills of exchange not being paid in full at maturity, were duly protested for non-payment, and were returned to the plaintiffs.

Plaintiffs' counsel requested the court to charge the following propositions, among others: That the defendants had not in any sense proven, or that the evidence did not establish, an appropriation or sale of the corn in question by plaintiffs or

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their brokers; that the taking of the broker's contract on the part of the agents in Liverpool, Saunders & Co., simply perpetuated the lien or pledge of the merchandise covered by the bills of lading; that as Adlington & Nicholson requested Saunders & Co. to deliver the bills of lading to Campbell & Co., the delivery was brought within the authority of the letters of hypothecation.

The court declined so to charge, and the plaintiffs' counsel duly excepted.

The plaintiffs' counsel then asked the court to charge that Campbell & Co. took the bills of lading in the interest of Adlington & Nicholson, and for the purpose of carrying out the contracts of sale made for Adlington & Nicholson's account; that the trust created by the broker's contract or guaranty was a trust in favor of the acceptors, as well as in favor of the plaintiffs. The acceptors were liable upon their acceptances, and Campbell & Co. were, in reality, acting for their benefit; that the broker's guaranty was taken simply as collateral security for the bills of exchange.

The court declined so to charge, and plaintiffs' counsel duly excepted.

Further facts appear in the opinion.

E. T. Rice, for the appellants. Plaintiffs' liability in respect to the corn was that of pledgees. (*Bk. of Rochester* v. *Jones*, 4 N. Y., 497; 2 Kent's Com. [m. p.], 578; 2 Pers. on Con., 110.) The court erred in refusing to charge that Sinclaire & Marvin and Adlington & Nicholson were copartners in the corn transactions in question. (*Smith* v. *Wright*, 1 Abb., 243; *Eldridge* v. *Troost*, 3 id., 20; *Leggett* v. *Hyde*, 47 How. Pr., 524; *F. and M. Bk.* v. *B. and D. Bk.*, 16 N. Y., 125.) Plaintiffs were bound to exercise ordinary care only. (2 Kent's Com., [m. p.], 578; 2 Pars. on Con., 110; *Coml. Bk.* v. *Martin*, 1 La. An., 344.)

Thos. V. Cator for the respondents. Defendants and Adlington & Nicholson were not copartners. (*Pattison* v

Blanchard, 5 N. Y., 186; *Merrick* v. *Gordon*, 20 id., 93.) Defendants had the affirmative of the issue. (*Huntington* v *Conkey*, 33 Barb., 218; *Aynault* v. *Chamberlain*, id., 229.)

EARL, J. An agreement was made at the time the bills passed into the hands of the plaintiffs, which must control the rights of the parties. By that agreement if the bills of exchange were accepted, and the acceptances were satisfactory to McCalmont Brothers & Co., plaintiffs' London correspondents, the bills of lading were to be delivered up to the acceptors, who were consignees of the corn, and in that event plaintiffs would have to rely solely upon the personal responsibility of the drawers and acceptors for the payment of the drafts. But if the drawees declined to accept, or if they accepted, and the acceptances were not satisfactory, the plaintiffs' correspondents were authorized, at their discretion, to place the corn in the hands of brokers to be selected by them for sale, and they were required to apply the proceeds in payment of the bills. In the latter event plaintiffs could look to the drawers and acceptors only for the deficiency after applying the proceeds of the corn.

All the corn had been contracted to be delivered by the consignees, at different times, after its arrival in Liverpool, and before the maturity of the bills of exchange, and the defendants and their consignees were under obligation to fulfill these contracts. And it was expected, by both the drawers and acceptors, that the proceeds of the corn realized by delivery upon the contracts, would furnish the funds to pay the bills. Hence it was important that the consignees should at once control the bills of lading, and they were clothed with the usual and customary authority to obtain them. If plaintiffs' correspondents were not satisfied with their simple acceptances of the bills, the acceptors could, within the terms of the agreement upon which plaintiffs took the bills, make the acceptances satisfactory in any of the usual modes. And they could arrange for the delivery of the bills of lading to their own brokers employed to deliver the grain upon the contracts.

That is, after the acceptors had made their acceptances satisfactory, a delivery of the bills of lading to any other person or firm upon their order or request, would be the same as a delivery to them.

When the bills reached Liverpool they were presented for acceptance, and were accepted, and we may infer, from the fact that plaintiffs' correspondents retained the bills of lading, that they were not satisfied with the acceptances alone, although there is no express proof of any dissatisfaction, and no proof that the acceptors upon acceptance asked for the bills of lading. When the corn arrived the consignees procured from plaintiffs' correspondents blanks, which they filled up for what is called the guaranties. They affixed their stamps to the instruments thus filled up, and wrote on the backs of them, over their signatures, the words, "The within engagement given at our request." They delivered these instruments to Campbell & Co., and Campbell & Co. delivered them to plaintiffs' correspondents and received the bills of lading. Whose brokers were Campbell & Co.? Not plaintiffs. Their correspondents held the bills of lading, and the bills of exchange were perfectly secure. It was not for their benefit that the bills of lading were given up. The arrangement which resulted in giving them up was made for the benefit of the defendants and their consignees. Plaintiffs' correspondents had had no relations with Campbell & Co., but they had acted as brokers of the consignees, and had made the contracts for the future delivery of this corn. The consignees procured them to sign these instruments, and they stated on the backs of them that the instruments were executed by Campbell & Co., at their request, and that amounted to a request to plaintiffs' correspondents to deliver to them the bills of lading upon the receipt of the instruments. Plaintiffs' correspondents were not to control the brokers nor dictate, as they could if they had employed them, to whom and upon what terms they should sell the corn. They were, by the arrangement with the consignees, to deliver the corn upon the contracts previously made. This was the mode taken by the consignees to make

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their acceptances satisfactory, and it appears in the evidence to have been a customary mode. Plaintiffs' correspondents had thus parted with the bills of lading and placed them beyond their control, and the delivery to Campbell & Co., upon the request of the consignees, was, in effect, a delivery to the consignees.

After plaintiffs' correspondents had thus parted with the bills of lading, they had, as security for the payment of the bills, the drawers and acceptors, and the guaranties signed by Campbell & Co. The failure of Campbell & Co. to perform their agreement in no way affects plaintiffs' claims against the parties to the bills. It is not true that Campbell & Co. are not liable to account to the defendants. They did render the account of the sales of the corn to the consignees, thus showing whose brokers they understood they were. They received defendants' corn upon an agreement that they would dispose of it and apply the proceeds in discharge of defendants' liability, and having failed to perform this agreement, the defendants can call them to account.

We are, therefore, of opinion, upon the documents and undisputed evidence, that the plaintiffs were entitled to recover, and the judgment appealed from must be reversed, and new trial granted.

All concur.

Judgment reversed.

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MARY K. SULLIVAN, by Guardian, etc., Respondent, *v.* MARY SULLIVAN et al., Appellants.

Although remaindermen and reversioners may be made parties defendant in an action for partition, they cannot institute the action, at least as against others not seized of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainderman has neither, but simply an estate to vest in possession *in futuro*.

As to whether remaindermen having undivided interests may compel a

Opinion of the Court, per ALLEN, J.

partition as between themselves, leaving the tenants entitled to the possession undisturbed, *quære.*

Blakeley v. *Calder* (15 N. Y., 617) distinguished and limited.

Howell v. *Mills* (56 N. Y., 226) distinguished.

Sullivan v. *Sullivan* (4 Hun, 198) reversed.

(Argued April 7, 1876; decided April 18, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered on the report of a referee. (Reported below, 4 Hun, 198.)

This was an action for partition. On the 24th day of April, 1870, the premises in question were owned by John Sullivan and by defendant Thomas Sullivan as tenants in common. On that day said John Sullivan died, leaving a will, by which he devised the premises to his widow, the defendant Mary Sullivan, for life, with remainder to the plaintiff herein. The referee decided that the action could be maintained, and directed judgment for a sale of the premises.

Esek Cowen for the appellant. A remainderman cannot commence an action of partition even when he holds as a tenant in common with others. (*Brownell* v. *Brownell*, 19 Wend., 367; *Van Schuyver* v. *Mulford*, 59 N. Y., 426; 1 Washb. on R. P., 562; *Blakeley* v. *Calder*, 15 N. Y., 626.)

Martin I. Townsend for the respondent. Plaintiff could commence an action for partition. (*Blakeley* v. *Calder*, 13 How. Pr., 479; 15 N. Y., 617; *Howell* v. *Mills*, 7 Lans., 193; 56 N. Y., 226.)

ALLEN, J. Originally, partition could only be enforced between co-parceners, but by statute in England, as early as the thirty-first of Henry VIII, compulsory partition was allowed between joint tenants and tenants in common of any estate or estates of inheritance in their own rights or in the right of their wives; and by a further act, passed the thirty-

second year of the same reign, it was allowed, where some of the tenants had estates for a term of life or years with others that had estates of inheritance or freehold in lands. But it was only allowed where there was an actual tenancy or holding of the parties to the writ, and where any of the parties were seized or possessed of a particular estate for life or years, the partition was necessarily as to such parties temporarily only and commensurate with their estates. To make the partition absolute another writ against the remainderman was necessary when his estate fell into possession. (Allnatt on Partition, 32 *et seq.*; *Cole* v. *Aylott*, Litt. R., 300; Broome & Had., Com., 71.)

A writ of partition would not lie at the instance of a remainderman seized of an estate subject to a term for the life of a tenant in possession. If an action for partition will lie at the suit of one in remainder it must be by virtue of the statutes regulating the proceeding for partition in this State. Prior to the Revised Statutes it was well understood that to entitle one to institute proceedings for a partition of lands he must be in the actual or constructive possession of the lands sought to be partitioned. There are obvious reasons why a remainderman should not, especially as against tenants in possession, whether of a term for years, for life or in fee, be entitled to institute the proceeding. Any partition which might be made at his instance, although equal when made, might be very unequal when his estate should vest in possession. So, too, if actual partition could not be made, and a sale should be necessary, the tenants having a less estate than a fee might be deprived of the substantial benefit of their terms. (*Brownell* v. *Brownell*, 19 Wend., 367; *Clapp* v. *Bromagham*, 9 Cow., 530; *Burhans* v. *Burhans*, 2 Barb. Ch. R., 398.) Since the Revised Statutes, although not expressly decided, the impression has been that none but a tenant in actual possession, or having the right of possession, and the constructive possession, could maintain the action. (*Florence* v. *Hopkins*, 46 N. Y., 184; *Van Schuyver* v. *Mulford*, 59 id., 426.) The question was not involved and

was not decided in *Blakeley* v. *Calder* (15 N. Y., 617), or *Howell* v. *Mills* (56 id., 226). In those cases the decision was merely that the court whose judgments were called in question, collaterally in the first case, and directly in the last, had general jurisdiction of proceedings in partition, and had acquired jurisdiction of the parties by service of process and by appearance, and that, therefore, the judgments were not void. In the last case the question now presented was not raised by an exception taken at the trial, and was not considered by the court. It is true that in *Blakeley* v. *Calder*, a distinguished judge, whose opinions are entitled to great weight, argued that under the Revised Statutes a remainderman might maintain the action, and in his views three other members of the court appear to have concurred; but the judgment of the court did not sustain his conclusions. That case, however, is to be distinguished from this in this, that the action was brought by one remainderman against some fourteen other individuals seized of a like estate in remainder and in common with him. It is not necessary to consider whether remaindermen, having undivided interests, may compel a partition as between themselves, leaving the tenants entitled to the possession undisturbed in their rights and interests, although I can find no precedent for it or authority in the statute as I read it. The statute (2 R. S., 317, § 21) authorizes a partition where several persons shall hold and be in the possession of any lands, etc., as joint tenants or as tenants in common, and permits any one or more of such persons to make application by petition for partition. By sections 5 and 6, every person having an interest in the lands, including persons entitled in remainder, may be made parties. And subsequent provisions of the statute, especially sections 35, 36 and 66, make the judgment conclusive upon the parties thereto, including remaindermen, and in case of a sale, provide for the investment of the proceeds for the benefit of those entitled. These provisions are all consistent with the position of the defendants here, that while remaindermen and reversioners may be made parties defendant in the proceed

:ng, they may not institute an action or inaugurate proceedings for a partition. Section sixteen is inconsistent with the claim of a remainderman or reversioner, or other party out of possession to bring the action. It permits the defendants to plead that the petitioners or any of them were not, at the time of commencing the proceedings, in possession of the premises or any part thereof. Effect was given to this section, as well as to the limitations of section 1 of the act, in *Van Schuyver* v. *Mulford*, and *Florence* v. *Hopkins* (*supra*). The act of 1847, chapter 430, section 5, which is cited in *Blakeley* v. *Calder* as a part of the Revised Statutes, and again as a part of the law of 1847, and as supplementing the Revised Statutes, has full effect by restricting the right to bringing an action for partition to one in actual or constructive possession of the lands sought to be partitioned. The language of the Revised Statutes is very explicit, and gives the right of action only to those who hold and are in possession of lands, etc., as joint tenants or tenants in common. The revisers did not intend to relax the rule which they regarded as established, and were of opinion that the policy of the act would be promoted by requiring that the petitioners should be actually in possession of some part of the premises. They regarded that as settled by *Bromagham* v. *Clapp* (*supra*), and the intent was to give effect to that decision. (Rev. notes, 5 Stat. at Large, 443.) The most liberal interpretation that can be given to the term joint tenants or tenants in common "holding and in possession" of lands, etc., will require at least a constructive possession in the individual seeking to avail himself of the act. A tenant implies a holding and possession of lands as distinguished from a mere valid claim of right or an estate to vest in possession *in futuro*. (*Clift* v. *White*, 2 Kern., 519, *per* MARVIN, J.) It is not claimed that a joint tenancy existed between any of the parties to this action. The distinctive feature of a tenancy in common is unity of possession. (2 Bl. Com., 161.) A possession is something more than a mere right or title whether to a present or future estate. It implies a present right to deal with the property at pleasure and to

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exclude other persons from meddling with it. Actual possession is the actual exercise of such present power by the owner. Constructive possession may exist without an actual *pedis possessio*, where there is a present right and the possession is either vacant or is consistent with the right of the owner to an immediate and actual possession by himself. One in actual or constructive possession may maintain trespass or other possessory action. There can be no possession, actual or constructive, by an owner of an estate in lands without at least the right to actual possession as against every other person. *Hubbard* v. *Austin* (11 Vt., 129) is an instance of constructive possession giving the owner the right to a possessory action. There was no tenancy in common by the plaintiff with either of the defendants, and the plaintiff did not hold and was not in possession, either actually or constructively, of any part of the lands sought to be partitioned. We think it too well settled by authority, as well as upon principle, that a remainderman cannot, as against others not seized of a like estate in common with him, maintain the action to disturb the rule. If the action should be extended and the benefit given to other parties, it must be done by legislation.

Judgment must be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

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117 330
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151 248
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152 487
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169 181

HIRAM B. THURBER et al., Respondents, *v.* JOHN M. CHAMBERS et al., Impleaded, etc., Appellants.

The will of J. devised his real estate to his wife for life, remainder to H., an adopted son, "and his heirs." The words quoted were interlined. In another clause in the will he charges certain bequests upon "the estate hereby devised to" H. H. died prior to the death of the testator. In an action for partition of the lands, *held*, that while the word "heirs" could be considered as "children," where from the whole will that appeared to have been the intent, there was no evidence here of such intent, and the word was, therefore, one of limitation, not of purchase;

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that the devise lapsed and the children of H. had no interest in the land.

In the clause of the will giving bequests was a provision directing that W. should be maintained and provided for during life out of the testator's estate, and the estate devised to H. was "charged with the bequests" mentioned in said clause, and the same were declared "a mortgage on the estate" so devised. By a subsequent clause, in case of the death of the testator's wife prior to his own death, his whole estate, real and personal, was given to H., subject to the payment of the legacies "and to the support and maintenance of the said" W. *Held*, that the provision for the support of W. was a "bequest," and was a lien and charge upon the real estate devised to H.; and that, although the devise lapsed, the lien followed the remainder in the hands of the heirs of the testator.

Plaintiffs, at the request of W., and upon the faith and credit of the provision made for her in the will, supported her during her life. *Held*, that it was to be presumed it was the intention of the parties that plaintiffs should have the benefits of the provision of the will, to which intent the court of equity would give effect, and that, therefore, a holding of an equitable assignment in favor of plaintiffs was proper.

Thurber v. *Chambers* (4 Hun, 721) modified as to costs.

(Argued April 7, 1876; decided April 18, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 4 Hun, 721.)

This action was for the partition of certain lands situate in St. Lawrence county.

On February 23, 1850, one-half of the premises in question was owned by Hiram B. B. Thurber, the other half by Kelsey T. Thurber. The former was an adopted son of the latter, but not of his blood. On the day mentioned said Kelsey T. Thurber executed his last will and testament containing the following clauses:

"First. I give and bequeath to my beloved wife Catherine, all the moneys and personal estate of which I may die possessed, and authorize her, if she should survive me, to dispose of the same by will,

Second. I give and devise unto my said wife a life estate

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in all the lands and tenements of which I may die seized, to be held and enjoyed, if she shall survive me, during her natural life.

Third. At the decease of my said wife, I give, devise and bequeath to my adopted son, Hiram B. B. Thurber, and his heirs, all the real estate of which I may die seized, so that at my wife's death he and his heirs shall be seized thereof in fee, but the same shall be subject to the conditions and bequest in the next section of this will mentioned.

Fourth. I give, devise and bequeath to my sister, Betsey Campbell, twenty-five dollars; to my sister, Polly Chambers, twenty-five dollars; to my brother, John K. Thurber, twenty-five dollars; to my nephew, Henry J. Pohlman, twenty-five dollars; to my neice, Eleanor, wife of Gates Pope, twenty-five dollars; to my neice, Catherine, wife of Josephus Bellinger, twenty-five dollars; to my nephew, William Pohlman, twenty-five dollars; to my niece, Eliza Breckenridge, twenty-five dollars; to be paid by the said Hiram Thurber within one year and six months after the decease of myself and wife, or the survivor of us. And I also will and direct that Elsie Whitney, an aged lady, who has resided with me for nearly forty years, shall be supported and maintained and provided for out of my estate during her natural life; and the estate hereby devised to Hiram B. B. Thurber is charged with the payment of the bequest mentioned in this section of this will, and the same are a mortgage on the estate so devised to said Hiram.

Fifth. If I should survive my wife, then I give, devise and bequeath all my estate, real and personal, to my said adopted son, Hiram B. Thurber, and his heirs, subject, however, to the payment of the legacies bequeathed in the fourth section of this will, and to the support and maintenance of the said Elsie Whitney."

Hiram B. B. Thurber died in 1851, leaving him surviving ten children, of whom plaintiff, Hiram B. Thurber, is one. The testator died in 1857, leaving surviving him his widow, Catherine, aged about eighty-five, and the said Elsie, named

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in the will, aged about seventy-three. His heirs at law were the descendants of four sisters, who are parties defendant to this action, as are also the other children of Hiram B. B. Thurber. After the death of the testator, the said Catherine and Elsie, who were helpless and infirm, requested the plaintiff, Hiram, to support and take care of them, referring to the will as providing a means of payment for such support; a few days after, showing and allowing him to read those portions of the will in which provision was made. Afterwards, and on or about the 22d day of April, 1859, said plaintiff undertook the support and care of said Catherine and also of Elsie, and continued their maintenance, care and support until the death of each; the said Elsie dying April 8, 1871, and the said Catherine, May 18, 1873. The value of the support and care of said Elsie, as found, was $3,416.43.

The judgment of Special Term directed a sale of the premises. The proceedings were not stayed upon appeal and the premises were sold, the half left by the testator realizing, over costs and expenses, the sum of $2,282.29. Further facts appear in the opinion.

B. H. Vary for the appellants. The charge for the support of Elsie Whitney did not attach to and become a lien upon the residuary estate. (*Dodge* v. *Manning*, 11 Paige, 334; *Reynolds* v. *Reynolds*, 16 N. Y., 259; *Campporene* v. *Shuler*, 2 Paige, 122; *Chyrstie* v. *Phyp*, 19 N. Y., 344.) There was no equitable assignment in favor of plaintiff. (*Hoyt* v. *Story*, 3 Barb., 262; *Rogers* v. *Hosack*, 18 Wend., 319; *Dodge* v. *Wilbur*, 10 N. Y., 580.) Plaintiff was not entitled to be subrogated in the place of Elsie Whitney. (*Wilkes* v. *Harper*, 1 Comst., 586; *Sanford* v. *McClear*, 3 Paige, 122.) If plaintiff has any claim it is against the estate of Elsie Whitney. (*Temple* v. *Nelson*, 4 Metc., 584; *Wilkes* v. *Harper*, 1 Comst., 586.) The devise to the adopted son of the testator lapsed by his death. (3 Black. Com., 513; *Chrystie* v. *Phee*, 22 Barb., 195; *Campbell* v. *Rawdon*, 19 id., 499; *Bishop* v. *Bishop*, 4 Hill, 138; *Van Buren* v. *Dash*, 30 N.

Y., 393; 2 R. S., 66, § 52; *Weed* v. *Aldrich*, 9 N. Y. S. C. R., 531; *Livingston* v. *Green*, 52 N. Y., 118; *Moore* v. *Lyons*, 25 Wend., 119.)

Edward C. James for the respondents. The devise to the testator's adopted son did not lapse by the death of the latter. (*Taggart* v. *Murray*, 53 N. Y., 233; *Bundy* v. *Bundy*, 38 id., 410; *Moore* v. *Little*, 41 id., 66; *Campbell* v. *Rawdon*, 18 id., 412; *Cushman* v. *Horton*, 59 id., 149; *Sheridan* v. *House*, 4 Abb. Ct. App. Dec., 218; *Wild's Case*, 6 Coke, 17; *Oates* v. *Jackson*, 2 Str., 1172; *Ex parte Williams*, 1 J. & W., 91, note; *Cook* v. *Cook*, 2 Vern., 545; *In re Sanders*, 4 Paige, 293; *Hannan* v. *Osborn*, id., 336; *O'Brien* v. *Heney*, 2 Edw. Ch., 242; *Roome* v. *Phillips*, 24 N. Y., 463; *Scott* v. *Guernsey*, 48 id., 106; *Haven* v. *Banks*, 4 Edw. Ch., 664.) Plaintiff was entitled to payment for Elsie Whitney's support. (*Godard* v. *Pomeroy*, 36 Barb., 546; *Birdsall* v. *Hewlett*, 1 Paige, 32; *Hogeboom* v. *Hall*, 24 Wend., 146; *Chase* v. *Peck*, 21 N. Y., 581; *Stevens* v. *Cooper*, 1 J. Ch., 425; *Cheesebrough* v. *Millard*, id., 409; 1 H. & W. L. C. in Eq. [3d ed.], 152–156; 2 id., 230; *Matthews* v. *Aiken*, 1 N. Y., 595; *Carter* v. *Jones*, 5 Wend., 193; *Croft* v. *Poole*, 9 Watts, 451.)

CHURCH, Ch. J. Neither of the three principal questions argued in this case is free from difficulty, and I have arrived at the conclusion to sustain the decision of the General Term with some hesitation and doubt. The question whether the devise to Hiram B. B. Thurber lapsed by reason of his death prior to that of the testator, depends upon whether the word "heirs" is to be construed as children. If not so construed it is a word of limitation, and the devise would lapse; if so construed it is a word of purchase, and the children would take equally with the father; and in that case the appellants, as heirs of the testator, would take no interest in the estate.

Prior to the Revised Statutes a devise to a person without adding the words, "and to his heirs," would only create a life estate; and although those words are not now necessary to

create a fee, their use ordinarily only serves as a limitation to vest the fee in the devisee. The word *heirs* will, however, be construed to mean *children* when, from the whole will, such appears to have been the intention of the testator. (53 N. Y., 233, 238; 38 id., 410.) The interlineation by the person who drew the will, of the words, "and his heirs," is relied upon as evidence of such intent. Although the use of them was unnecessary to vest a fee, it is quite common, and the usual way in deeds and conveyances to insert them for greater certainty, and their use, although intentional, as evidenced by their being interlined, is very slight to indicate a design to make a joint devise to Thurber and his children. Indeed, it might be inferred that if such was the intention of the interlineation, language would have been used, of certain import, to accomplish the purpose. The circumstance that the testator did not change his will after the death of Hiram, if competent upon this question, is very equivocal and not entitled to much consideration. Besides, in the will itself, in charging the legacies, the testator charges them upon the estate "hereby devised to Hiram B. B. Thurber," thus defining the devise as an estate limited to him; so that, to say the least, the intention is not sufficiently indicated to justify the construction that the heirs in this will means children.

The next question is, whether the support of Elsie Whitney is charged in the will upon the remainder devised to Hiram. The fourth clause of the will, after making several specific legacies and directing that Elsie Whitney shall be supported "out of my estate," declares, "and the estate hereby devised to Hiram B. B. Thurber is charged with the payment of the bequests mentioned in this section of this will, and the same are a mortgage on the estate so devised to the said Hiram;" and by the next clause, in the event that the testator survives his wife, the said legacies are charged upon the estate devised to Hiram, and also, "the support and maintenance of the said Elsie Whitney."

It is argued that the "bequests" which are charged in the fourth clause were not intended to include the support of

Elsie Whitney, and that such support was charged generally upon his estate. Although the language indicates a distinction between "bequests" and the support of Miss Whitney, that is not decisive of the point, as unnecessary words are often used for greater certainty. It is quite evident that the testator intended to charge his estate with the support of Elsie Whitney, and, it is a reasonable inference, that he intended to charge his real estate. Upon the appellant's construction, the real estate would not be charged at all; and yet by the fifth clause it is expressly charged upon his whole estate. The provision for this old lady was a "bequest," and is legally embraced within the language used in the fourth clause; and unless a contrary intention is evinced in other parts of the will, the legal effect of the language must prevail. No such intention appears.

It is a general rule that provisions in a will intended for the support of the wife, will receive the most favorable construction to accomplish the purpose intended. The whole estate was given to the wife for life. It does not appear what the amount of the personal estate was; the farm consisted of 170 acres of land, an undivided half of which had been conveyed to Hiram by deed. It cannot be presumed that the testator intended to abstract from the income of a small farm, which common experience shows would afford but a scanty support for the widow, sufficient to support another person, who from age and infirmity was unable to render much assistance to others, or even to herself, and especially will this not be presumed against the legal effect of the language employed.

The plaintiff having occupied the premises and supported Miss Whitney, claims the benefit of the lien created by the will. Although the devise in favor of Hiram lapsed, the lien or charge for her support attached to, and followed, the remainder, devised to Hiram, in the hands of the heirs. (36 Barb., 546; 1 Paige, 32.) And if the plaintiff is entitled to the benefit of this lien it will absorb the avails of the property which has been sold. It is found that the plaintiff sup

ported Elsie Whitney upon the faith and credit of the provisions made for her in the will. The evidence is meager upon this point, but I think it sufficient to sustain the finding. It was proved that such support was furnished at the request of the legatee, and the will was examined and referred to as containing a provision for such support. It is reasonable to infer that the parties intended that the plaintiff should have the benefit of the lien; and it is not indispensable to enable a court of equity to carry out such intention that they should have known and understood the precise legal effect of the will or the lien. It may be implied from the circumstances, and what little transpired, that the design was to compensate the plaintiff with the provision in the will. They may not have understood the legal character of that provision, nor that the devise lapsed, but it is quite evident that the plaintiff was to have the benefit of it; and equity will carry out that intention, although it may be necessary to do so in a different manner from what was anticipated. It is peculiarly the province of equity to enforce the substantial rights of parties, and it will construe the circumstances surrounding a transaction for this purpose.

It was not necessary that the assignment should be in writing. A parol assignment is equally effective; and if, from what took place, an inference may be drawn that the parties intended that the plaintiff should have the benefit of the provision in the will in any way, a court of equity will give effect to the general intention by securing the plaintiff's right in any legal way. There is no pretence that any one else rendered any support; the presumption is that Elsie had no other means of support; the will was referred to as a reliance for support, in connection with a request to plaintiff to render the support. Under these circumstances I think the court below was justified in holding an equitable assignment in favor of the plaintiff.

The question of costs is raised by the appellants. At the Special Term one half of the costs was awarded against the appellants, which was affirmed. As the appellants have suc-

ceeded in establishing that the legacy lapsed, they were justified in making a defence to the title of the plaintiff, and as to the lien or charge in favor of Elsie Whitney and in contesting the amount of it, and they should have the costs out of the fund.

The judgment should be affirmed with the modification that the appellants, in this court, as well as the respondents, are to be allowed costs out of the fund reserved.

All concur.

Judgment accordingly.

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J. CHARLES SAUTER, Administrator, etc., Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Where a person who, through the negligence of another, has received an injury which, without a surgical operation, would cause his death, employs a competent and skillful surgeon, by whose mistake the operation is not successful, and the patient dies, the wrongdoer is not shielded from liability by the surgeon's error, and this, although the operation is the immediate cause of the death.

The sudden jerking of a railroad train backward while passengers are rightfully passing out of the cars is liable to produce accidents, and is negligence.

In an action to recover damages for negligently causing the death of another, the Northampton tables are competent evidence to show the probable duration of life of the deceased, which is an element in estimating damages.

Patrick v. *Com. Ins. Co.* (11 J. R., 14); *Livie* v. *Janson* (12 East, 655) distinguished.

(Argued April 11, 1876; decided April 18, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 6 Hun, 446.)

Statement of case.

This action was brought to recover damages for injuries alleged to have caused the death of John Sauter, plaintiff's intestate, and to have been occasioned by the negligence of plaintiff's employes.

The facts appear sufficiently in the opinion.

S. W. Jackson for the appellant. The *onus* was upon plaintiff to show that the death of the deceased was caused by defendant's negligence. (*Sheldon* v. *H. R. R. R. Co.*, 29 Barb., 226; *Curran* v. *W. C. and Mfg. Co.*, 36 N. Y., 153.) Defendant was only liable for those injuries of which its negligence was the probable cause. (S. & R. on Neg., § 595; *Patrick* v. *Com. Ins. Co.*, 14 J. R., 14; *Livie* v. *Janson*, 12 East, 655; *Flower* v. *Adam*, 2 Taunt., 314; *Mott* v. *H. R. R. Co.*, 1 Robt., 593; *Anthony* v. *Slaid*, 11 Metc., 290; *Crain* v. *Petrie*, 6 Hill, 522; *McGrew* v. *Stone*, 53 Penn. St., 436; Whart. on Neg., § 134.) A wrongdoer is only liable for those consequences which are the natural and proximate result of the wrong complained of, and which may be reasonably expected to result under ordinary circumstances. (*Lowery* v. *W. U. Tel. Co.*, 60 N. Y., 201; *Putnam* v. *Bd. and Seventh Ave. R. R. Co.*, 55 id., 116; *Greenland* v. *Chaplin*, 5 Exch., 248; *Saxton* v. *Bacon*, 31 Vt., 546; *Powell* v. *Salisbury*, 3 Y. & J., 391; *Calkins* v. *Barger*, 44 Barb., 424; *Wells* v. *N. Y. C. R. R. Co.*, 24 N. Y., 187.)

E. W. Paige for the respondent. If the mistake of the doctor directly caused the death, and the hernia had nothing to do with it except to render the operation necessary, still defendant is liable. (*Com.* v. *Hackett*, 2 Al., 140; *Clark* v. *Lebanon*, 63 Me., 393; *Vandenburgh* v. *Truax*, 4 Den., 464; *Pollett* v. *Long*, 56 N. Y., 202.) The deceased was not bound to employ the most skillful surgeon. Ordinary care only was necessary. (*Lyons* v. *Erie R. Co.*, 57 N. Y., 490.) The jolt which occurred when the deceased was injured was negligence as matter of law. (*Milliman* v. *N. Y. C. and H. R. R. R. Co.*, 4 Hun, 409; 6 T. & C., 585; *Keating* v. *N. Y. C. and*

H. R. R. R. Co., 49 N. Y., 673.) It was proper upon the question of the duration of life of the deceased to receive in evidence the Northampton tables. (*Schell* v. *Plumb*, 55 N. Y., 592.)

CHURCH, Ch. J. The circumstances proved were sufficient to authorize the jury to find that the injury was caused by the act of the defendant's employes. The evidence tends to show that as the plaintiff's intestate was passing out of the car to alight, a sudden jerk was given to it backward, and the plaintiff was thrown suddenly forward, his carpet-bag striking the railing, and he striking the carpet-bag. This was proved to be sufficient to cause the hernia of which he died. The circumstances pointed to this as the cause, and repelled the idea of any other. True, the evidence was that it might have been produced by many other causes, but there was no evidence tending to prove that it was produced by any other. On the contrary, the inference was legitimate that it was not.

It is claimed that the injury was not the proximate cause of death. The deceased had what the surgeons denominated strangulated hernia, an injury certain to produce death, unless relieved. Being unable to reduce it by pressure, an operation was decided upon and performed by surgeons of conceded competency and skill. The operation is a very delicate and dangerous one, but is often and perhaps generally performed with success. In this case the *post-mortem* examination disclosed that there were two strictures, only one of which had been cut, and that a mistake was made by pressing the intestine into an abnormal cavity, between the peritoneum and pubic bone, produced in some manner by a separation of the peritoneum from the bone, instead of pressing it into the abdomen. There was a difference of opinion whether the immediate cause of death was by the mistake in pressing the intestine into the wrong cavity or by the natural effect of the second stricture which was not cut; but assuming that it was the mistake, which is the most favorable for the defendant, is the principle invoked by the learned counsel applicable? I

think not. The cases cited do not sustain the position. The case of *Patrick* v. *Commercial Insurance Company* (11 J. R., 14) was an action upon a policy against sea-risks. The vessel stranded, but before she could be got off she was forcibly seized and burned by a public enemy, and it was very properly held that the damage was from the capture, and not the stranding. *Livie* v. *Janson* (12 East., 655) was analagous in principle. To bring a case within the principle claimed, the general rule is that the actual injury must be occasioned by the intervention of some responsible third party or power. (Wharton on Neg., § 134.) I do not think that the mistake of the surgeon can, in any sense, be regarded as such. The employment of a surgeon was proper, and may be regarded as a natural consequence of the act, and the mistake which it is evident might be made by the most skillful, may be regarded of the same character. In *Lyons* v. *The Erie Railway* (57 N. Y., 489), the Commission of Appeals held, if one who is injured by the negligence of another, acts in good faith under the advice of a competent physician, even if it is erroneous, he may recover, and that the error is no shield to the wrong-doer. The rule is laid down in *Commonwealth* v. *Hackett* (2 Allen, 137), that one who has willfully inflicted upon another a dangerous wound from which death ensued, is guilty of murder or manslaughter, as the case may be, although, through want of due care or skill, the improper treatment of surgeons may have contributed to the result.

Here it is sought to shield the wrong-doer because the deceased failed to procure relief, although he used the usual and best available means for that purpose. He would have died without an operation; assuming that by the mistake of the surgeon the operation was not successful, can it be justly said, in the first place, that the surgeon and not the injury killed him; and in the second place, that the surgeon is to be regarded as a responsible intervening third person, within the rule referred to? There is no authority that approaches such a proposition. Hence there was no error in refusing to charge that if death was proximately caused by pressing the intestine

into the abnormal cavity, the plaintiff could not recover. The court had charged that if the hernia was not the proximate cause of death the plaintiff could not recover, nor unless it was caused by the defendant. The court also charged that if death was produced by the error, ignorance, blunder, or maltreatment of the surgeon, the plaintiff could not recover. The charge was quite as favorable to the defendant as the case would warrant.

Error is also alleged upon the refusal of the court to charge that the plaintiff could not recover, unless the jury found that the injury would be reasonably apprehended by a prudent man as the result of the alleged movement of the cars. The court declined to charge other than as he had charged. He had charged that if after the train was stopped it was given such a jolt as to endanger the lives of passengers, the act would be wrongful. The sudden jerking of a train backward while passengers are rightfully passing out of the cars, is evidently liable to produce accidents, and under such circumstances is a negligent act. There was no foundation, therefore, for the test of apprehended danger by a prudent man. At all events, the charge made was favorable to the defendant in any aspect of the case. The Northampton tables were properly received. (*Sohell* v. *Plumb*, 55 N. Y., 592.) The probable duration of the deceased's life was an element in estimating damages, and being so, it was proper to give this evidence upon the question.

The judgment must be affirmed.

All concur.

Judgment affirmed.

Statement of case.

CHARLES H. BISSELL, Supervisor, etc., Respondent, *v.* RAYMOND SAXTON et al., Appellants.

The sureties upon the bond of a public officer are liable thereon only for the defaults of their principal committed after the commencement of the term of office for which they became his sureties. Although their principal held the office during a preceding term, they are not liable for a defalcation which then occurred.

In such case those who were sureties for the officer for the prior term must be looked to.

In an action upon a bond of an officer, his official reports are not conclusive as against his sureties, but mere admissions of the principal, subject to explanation.

Accordingly, *held*, that the official reports of railroad commissioners charging themselves with a certain fund were not conclusive against their sureties in an action upon their bond, that the commissioners then had the fund on hand; and, it appearing that the fund had in fact been received and converted by one of their number during a prior term, that the sureties were not liable.

So, also, *held*, that statements made by the principals upon applying for a reappointment were not conclusive against the sureties.

The said commissioners were appointed under the act of 1856 (chap. 64, Laws of 1856) authorizing subscriptions by towns to the stock of the A. & S. R. R. Co. By the act of 1867 (chap. 747, Laws of 1867), amendatory of said act, each town commissioner is required to account annually for moneys coming into his hands, "with the interest thereon, provided such moneys have been used or loaned by him." *Held*, that this provision did not authorize a commissioner to use the funds in his hands in his individual business, and that in case he did so and failed to restore them it was a conversion of the funds and a defalcation.

(Argued February 25, 1876; decided April 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department in favor of plaintiff, entered upon an order denying motion for a new trial and directing judgment upon a verdict.

This action was brought upon a bond given by defendants, Fernando P. Draper and Arthur J. Griggs, as railroad commissioners, and signed by them as principals and by the other defendants as sureties.

The town of Westford, in the county of Otsego, prior to

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1867, in pursuance of chapter sixty-four of the Laws of 1856, and the various acts amendatory thereof and supplementary thereto, had appointed commissioners, issued their bonds and subscribed to the capital stock of the Albany and Susquehanna Railroad Company, and become the owner of 300 shares of said stock of the par value of $30,000.

On the 10th day of May, 1867, the defendants Arthur I. Griggs and Fernando P. Draper were appointed commissioners of said town for the purpose of carrying out the provisions of said acts, and duly qualified, and gave the requisite bond and entered upon the duties of such office.

On the last of July or 1st of August, 1869, Griggs and Draper sold the said 300 shares of stock for $30,000, or par, and received therefor a draft on Jay Gould, which the defendant Arthur I. Grigg, on August 2, 1869, paid to his credit at the banking-house of Vermilye & Co., in the city of New York. At that time Griggs had an account with Vermilye & Co., as a dealer in stocks, they purchasing stocks for him, charging him with the purchase-price, holding such stocks as collateral to such indebtedness, and selling the same credited him with the proceeds, less their commissions.

At the time Griggs deposited the said $30,000 with Vermilye & Co., they had so charged against him $50,000 to $55,000, for which they held stocks and bonds purchased for him in the manner aforesaid. At the expiration of their term of office, about May 10, 1870, Griggs and Draper appeared before the county judge with an application for reappointment, and Griggs stated to the county judge that the railroad moneys were invested in bonds and stocks; that they were put in so the town could get the interest. And Griggs and Draper were at that time reappointed commissioners for said town. Previous to their reappointment the said commissioners had paid, from moneys received by them, a portion of the outstanding bonds of said town. On their reappointment the said commissioners executed and delivered to the supervisor of said town, in the manner required by law, the bond in question, conditioned that the said Arthur Irving Griggs

and Fernando P. Draper should "faithfully discharge their duties as such commissioners under said acts, and should make a just and honest application of all moneys, stocks or bonds issued by them or coming into their hands, according to the true intent and meaning of said acts."

After the execution and delivery of said bond the commissioners immediately entered upon the duties of their office, and continued to act as such commissioners until their successors were appointed in July, 1873.

After the passage of the act, chapter 537, of the Laws of 1871, requiring the commissioners appointed under and by virtue of the several acts to facilitate the construction of railroads in this State, at each annual meeting of the board of town auditors, to render a written statement or report annually to said board, showing their receipts, expenditures, etc., at the annual meeting of the board of town auditors, held on the 6th day of February, 1872, Griggs and Draper, as such commissioners, presented their report in writing, wherein they reported a balance of moneys in their hands, as such commissioners, of $18,151.88. At the meeting of the board of town auditors, held on the 4th of February, 1873, they, in like manner, reported in their hands the sum of $17,720.38. On the 19th of July, 1873, other persons were duly appointed commissioners for said town, and demanded of Griggs and Draper all the books, bonds, papers and money belonging to the office of railroad commissioners, but Griggs and Draper gave up no moneys, bonds, or other papers.

The court directed a verdict for plaintiffs, to which defendants' counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term. The commissioners did not appeal.

Samuel S. Edick for the appellants. The sureties were only liable for defaults of their principal committed during the term of office for which they became his sureties. (*Vivian* v. *Otis*, 24 Wis., 518; *Myers* v. *U. S.*, 1 McL., 493; *County of Mahaska* v. *Ingalls*, 16 Iowa, 81; *Townsend* v. *Everett*, 4

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Ala., 607; 5 Pet., 573; *Farrar* v. *U. S.*, id., 389; *U. S.* v. *Boyd*, 5 How., 50; *U. S.* v. *Gerault*, 11 id., 22; *Bruce* v. *U. S.*, 17 id., 442; *Inhdbts. Rochester* v. *Randall*, 105 Mass., 295; Fell's Law of Sureties, 122, chap. 5; *Arlington* v. *Merrick*, 2 Sandf., 403–411; *Overacre* v. *Garrett*, 5 Lans., 156; *Bramford* v. *Iles*, 3 Exch., 380; 7 Har. Dig., 235; *Austin* v. *French*, 7 Metc., 126; *Dedham Bk.* v. *Chickering*, 3 Pick., 335; *Kingston Ins. Co.* v. *Decker*, 33 Barb., 196; *McCluskey* v. *Cromwell*, 11 N. Y., 598; *Amherst Bk.* v. *Root*, 2 Metc., 536.) The sureties are not estopped or concluded from proving the reports of Griggs and Draper false. (1 Greenl. Evi., § 187; *Erickson* v. *Smith*, 38 How. Pr., 454–467; *Parker* v. *Duffee*, 23 Wend., 292; *Fake* v. *Whipple*, 39 N. Y., 398; *Browning* v. *Hanford*, 7 Hill, 120.)

Samuel A. Bowen for the respondent. Defendants are liable for the just and honest application by their principals of all moneys and securities they had in their hands as commissioners at the date of the bond or subsequent thereto. (*U. S.* v. *Boyd*, 15 Pet., 187; *Moore* v. *Mad. Co.*, 38 Ala., 670; *Bernard* v. *Comm.*, 4 Litt., 148, 151; *Pendleton* v. *Bk. of Ky.*, 1 Mon., 171, 181; *Governor* v. *Twitty*, 1 Dev., 153; *Wash. Co. Ct.* v. *Harramond*, 4 Hawks, 339; *Comm.* v. *Rhoades*, 37 Penn. St., 60; 2 Phil. Ev. [C. & H. Notes], 669; 1 Greenl. Ev., § 187; *Whitnash* v. *George*, 8 B. & C., 556; *Middleton* v. *Melton*, 10 id., 317; *Davis* v. *Bemis*, 40 N. Y., 453, note; *Bennett* v. *Judson*, 21 id., 238; *President, etc.*, v. *Corbin*, 37 id., 320; *Ex. Bk.* v. *Monteith*, 26 id., 505; *State* v. *Grammer*, 29 Ind., 530; *Wayne* v. *Com. Bk.*, 52 Penn. St., 343; 7 Miss., 342; *Mann* v. *Eckford's Exrs.*, 15 Wend., 502; *McWilliams* v. *Mason*, 31 N. Y., 294; *Van Duzer* v. *Howe*, 21 id., 531; *Casoni* v. *Jerome*, 58 id., 315, 322; *U. S.* v. *Gerault*, 11 How. [U. S.], 28; *Vivian* v. *Otis*, 1 Am., 199; 24 Wis., 518.) If defendants could go behind the former reports they were bound to prove the actual loss or illegal appropriation of the moneys during their principal's former term. (*Bruce* v. *U. S.*, 17 How. [U. S.], 438; *Sleete*

v. *Babcock*, 1 Hill, 527; *Kerr* v. *Blodgett*, 16 Abb., 137; Story's Eq. Jur., § 1211.)

RAPALLO, J. This action was brought upon a bond given by the defendants, Draper and Griggs, as principals, and the remaining six defendants as sureties, for the faithful discharge by Draper and Griggs of their duties as railroad commissioners for the town of Westford, under an appointment to that office, for three years, from the 10th of May, 1870.

The bond recited the appointment of Draper and Griggs as commissioners for the town of Westford, to carry into effect an act authorizing the town to subscribe to the capital stock of the Albany and Susquehanna Railroad Company, for three years, from May 10, 1870; and the condition was that Draper and Griggs should faithfully discharge their duties as such commissioners under said act, and should make a just and honest application of all moneys, stocks or bonds issued by them or coming into their hands.

The breach alleged in the complaint consisted in the conversion, by Draper and Griggs, to their own use, of the sum of about $18,000, part of the sum of $30,000, which they had received as such commissioners, in the month of July, 1869, upon the sale of 300 shares of the stock of the railroad company, which had been acquired by the town of Westford, under the before mentioned act of the legislature.

It appears clearly, from the evidence, that this sum of $30,000 had been received, and that the whole of it had been converted by the defendant Griggs, to his own use, before the commencement of the term of office for which the bond now in suit was given, and while Draper and Griggs were holding the same office under a prior appointment, for three years, commencing in May, 1867. The proceeds of sale of the 300 shares of stock were received by Griggs, and were by him paid to Varnilye & Co., brokers in New York, on the 2d of August, 1869, on account of an individual indebtedness of Griggs to them, which amounted to upwards of $50,000; and

no part of this money was ever repaid, or came again into the hands of either Griggs or Draper.

After the payment of this $30,000, and before his reappointment, Griggs redeemed some of the bonds of the town with money raised from other sources, so as to leave him indebted, at the time of his reappointment, in the sum of $18,000 or $20,000; but it does not appear that any other money was in the hands of the commissioners at the time of the appointment of May 10, 1870, or came into their hands afterwards, for which they have not properly accounted. It thus appears that the defalcation for which this action is brought occurred during a term of office prior to that for which the bond in suit was given.

We think it a very clear proposition, on principle and authority, that the sureties upon the bonds of a public officer are liable only for defaults committed by him after the commencement of the term of office for which they became his sureties; and that if it should so happen that the same individual had previously held the same office, under a prior appointment, and had committed defaults during the term of that appointment, those who were his sureties on such prior appointment must be looked to for such defaults, and not those who signed his bonds on his reappointment. Their engagement is for his future, and not his past conduct; and it would be a gross imposition upon them, in the absence of a special stipulation to that effect, to import into their undertaking responsibility for prior delinquencies. This principle has been frequently recognized. (*Myers* v. *U. S.*, 1 McLean, 493; *Farrar* v. *U. S.*, 5 Peters, 372, 389; *U. S.* v. *Boyd*, 15 Peters, 187; S. C., 5 How. [U. S.], 50; *Vivian* v. *Otis*, 24 Wis., 518; S. C., 1 Am. R., 199, and numerous other cases cited on the brief of the appellants.)

It is claimed, however, upon the part of the plaintiff, that the reports made by Draper and Griggs, to the town auditors, for the years 1872 and 1873, were conclusive evidence against their sureties, that they then had in their hands, as commissioners, the balances specified in their reports. This claim

cannot be sustained. These reports were mere admissions of the principals, subject to explanation by the sureties, and not conclusive against them. (*U. S.* v. *Boyd*, 5 How., 50.) From the averments in the complaint it appear that the balances with which the commissioners charged themselves in their reports, arose from the receipt of the $30,000, in July, 1869; and the evidence shows that Griggs had converted this fund to his own use in August, 1869. Although the commissioners properly charged themselves as debtors for this balance, this did not conclude the sureties from showing that the defalcation occurred during the term which preceded that for which their bond was given. The statements made by Griggs and Draper to the county judge, on applying for their reappointment, stand upon the same footing.

It is claimed on the part of the respondents that the proofs fail to show that the sum of $30,000, paid by Griggs to Vermilye & Co., in 1869, was lost or misapplied, but show that this sum was invested by Griggs in the purchase of stocks and bonds which were, equitably, the property of the town, although held by Griggs in his own name; and that the act of 1867, impliedly, authorized Griggs to use the fund in that manner, inasmuch as it required the commissioners to account for interest on moneys which had been used or loaned by them, and therefore there was no defalcation in 1869.

I think it would be a very strained construction of this act to hold that if a commissioner used the funds in his hands, as such, in his individual business, and failed to restore them, he would not be in default, or that this provision of the act was a license so to employ the trust moneys. In the present case there was no evidence that these moneys were loaned by Griggs as commissioner, or invested in any securities. The proof was that they were paid by him on account of an existing individual debt of his to Vermilye & Co.; that they, at the time, held some securities as collateral to this debt, but what was their character or value is not disclosed. It does appear, however, that none of the money so paid ever came back, and that no interest of the town in the transaction was

recognized or in any manner protected. It was a clear conversion by Griggs of the fund to his own use, which was consummated before the commencement of his second official term, and for which an action on his first official bond could have been maintained.

We think the judge erred in directing a verdict for the plaintiff, and that the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

PLATT T. GOULD et al., Appellants, *v.* HENRY K. BOOTH et al., Commissioners, etc., Respondents.

Where commissioners of highway, in constructing an embankment upon a highway, omit to put therein a sufficient culvert to carry off the surface water from adjoining lands, their successors in office are not liable in a private action at the suit of the owner for injuries resulting from the accumulation of the water upon said lands caused by the embankment.

It seems, that commissioners, in grading highways, are not bound to provide a channel for the drainage of surface water, and are not liable for injuries resulting from their omitting so to do.

(Submitted March 27, 1876; decided April 25, 1876.)

THE nature of the action and the facts are sufficiently set forth in the opinion.

George Miller for the appellants. Defendants were liable for injuries from the accumulation of water on plaintiffs' lands, resulting from the embankment. (*Pixley* v. *Clark*, 35 N. Y., 520, 521; *Billows* v. *Sackett*, 29 Barb., 97; Domat, 616 [Cushion's ed.]; *Moran* v. *McClearns*, 63 Barb., 185; *Waffles* v. *N. Y. C. R. R. Co.*, 58 id., 413; Washb. on Easements [3d ed.], § 6, p. 450; *Kauffman* v. *Griesmer*, 26 Penn., 407; *Martin* v. *Riddle*, id., 415; *Lattimore* v. *Davis*, 14 La., 161; *Bassett* v. *Salesbury, etc.*, 43 N. H., 569, 571; *Butler*

v. *Peck*, 16 Ohio, 334; *Beard* v. *Murphy*, 3 Vt.; *Sweet* v. *Cutts*, 50 N. H., 433; *Ogburn* v. *Conner*, 46 Cal., 346; 13 Am. R., 213; Ang. on W. C., § 108, p. 146.)

Wm. Wickham for the respondents. Defendants were not liable for the injuries complained of. (*Garlinghouse* v. *Jacobs*, 29 N. Y., 297; *Bartlett* v. *Crozier*, 17 J. R., 439; *Smith* v. *Wright*, 27 Barb., 621; *Conrad* v. *Trustees of Ithaca*, 16 N. Y., 158; *Hickok* v. *Trustees of Plattsburgh*, 15 Barb., 427; *Goodall* v. *Tuthill*, 29 N. Y., 459; *Bowlsby* v. *Speer*, 2 Vroom, 351; *Parks* v. *Newburyport*, 10 Gray, 29; *Waffles* v. *N. Y. C. R. R. Co.*, 58 Barb., 413; *Dickinson* v. *Worcester*, 7 Al., 19; *Luther* v. *Win. Co.*, 9 Cush., 171; *Ashley* v. *Wallcott*, 11 id., 192; *Flagg* v. *Worcester*, 13 Gray, 601.

CHURCH, Ch. J. This action is brought against defendants as commissioners of highways of the town of Southold, Suffolk county, to recover damages alleged to have been sustained by the plaintiffs by reason of an insufficient culvert in an embankment in a highway, to drain the surface water from the low lands of the plaintiff abutting thereon. The plaintiff was nonsuited at the trial upon the ground that the public were not bound to provide a channel for the drainage of surface water.

I do not see how these defendants can be made liable in any event. They did not put in the culvert, nor had they any personal connection with it. The embankment was made and the culvert put in by their predecessors. The most that can be claimed against these defendants is, that they neglected to put in a new culvert. It is not shown that they had any funds in their hands applicable to this purpose, nor that the highway would be benefited by such a repair. We have not been referred to any authority justifying such an action. In *Garlinghouse* v. *Jacobs* (29 N. Y., 297) it was held that commissioners of highways are not liable in a private action for mere neglect or omission to keep the highways of their towns in repair. To hold these officers liable not only to those travel-

ing the highways for injuries by reason of defects and imperfections either in the original construction or by getting out of repair, but also to abutting owners for consequential injury to their lands, would impose a liability more extensive than was ever contemplated, and one which has no just legal foundation to rest upon.

It is not absolutely needful, therefore, to consider the question upon which the nonsuit was granted, but we think it was right. It is well settled that the owner of land may improve it in any manner he sees fit, by filling up or otherwise, without liability to an adjoining owner by reason of surface water being thereby prevented from running off as before from his land. (20 N. Y., 466; 2 Vroom, 351; 10 Gray, 29.) The same principle, I apprehend, applies to the construction of highways by public officers. In grading a highway the abutting owners may be incommoded in this respect; but such inconveniences, when consequent upon the exercise of legal rights by others, are regarded as the natural consequence of the right to maintain highways, and are presumed to have been contemplated when the land was appropriated for that purpose, and afford no ground of action. Culverts and sluices are proper and necessary in highways, but their location and manner of construction are very much within the discretion of the public officers, and they should not be harassed by personal actions for injuries occasioned by inadvertence or error of judgment, nor for a mere omission to perform an act which, although proper or even necessary to prevent incidental injury, when the performance cannot be exacted as a legal right. (Angell on Water-courses, § 108, and cases cited.)

In this case it was quite proper to put a culvert in the embankment after it was raised, and one was put in, but it is alleged that it was not deep enough to drain the surface water from the plaintiff's land. I do not think the plaintiff had a legal right to demand that the defendants should lower it, and had no right of action if they refused.

It is very rare that public officers fail to properly perform

discretionary duties in these respects, but if they are remiss they may be superseded by others who are more vigilant. For such errors or omissions private actions will not lie.

The authorities relied upon by the counsel for appellants are not applicable. *Waffle* v. *The New York Central Railroad Company* (58 Barb., 413) merely decides that a person may drain his own land into a running stream without liability to an action, although such drainage causes, at times, an increase of the volume of water in the stream to the damage of owners below. *Moran* v. *McClearns* (63 Barb., 185) decides that an overseer of highways is liable for turning a natural water-course or the natural course of a surface-water drainage so as to cast the water upon the lands of an owner of lands abutting the highway where it had not been previously accustomed to flow. There it was held that the overseer committed a wrongful act by casting water upon another's land producing an injury, and it was held analogous to casting any other material there.

It is unnecessary to pass upon the correctness of that decision, as it was quite different from this. In the case at bar there was the exercise of a lawful act upon one's own premises, and the complaint is, that the plaintiff is thereby inconvenienced, in that the surface water which would otherwise have run over the highway, is now prevented, to some extent, from so doing. The authorities are uniform in maintaining a distinction between an interference with a running stream, and the exercise of lawful dominion over one's own property which consequentially interferes with surface drainage. (Angell on Water Courses, § 108, and cases cited; 29 N. Y., 459.)

The judgment must be affirmed.

All concur.

Judgment affirmed.

Statement of case.

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180 386

MARY J. TURNER, Administratrix, etc., Respondent, *v.* GEORGE F. KELLER, Impleaded, etc., Appellant.

It seems, the general rule that an indorser of a promissory note contracts that the instrument itself and the antecedent signatures are genuine does not apply where the holder has procured an indorsement upon a forged note with knowledge of the forgery and upon a representation to the indorser that it was genuine, or where the holder received the note after maturity and without consideration from one who so procured the indorsement.

G. having failed in the butchering business, his brother H. bought out the business, and authorized G. to carry it on in his name. H. told E., of whom G. had been in the habit of purchasing cattle for the business, that, as he was carrying on the business, he would be responsible for all cattle sold to G. It was necessary and had been customary to give notes for cattle purchased. G. signed the name of H. to notes given to E. for cattle, which defendant K. indorsed upon the representation of E. that H. had signed them. Defendant knew the facts as to method of conducting the business, and had indorsed a large number of notes signed in the same way. In an action upon the notes, *held*, that the facts authorized an inference that G. had authority to sign notes in the name of H., and so justified a finding that the notes were made by H.

Defendant having given evidence tending to show that E. induced G. to sign the name of H. to the note, knowing that G. had no authority, and after authority was sought to be proved by the circumstances above stated, E., as a witness for plaintiff, was allowed to testify, under objection and exception, that at the time G. signed he supposed and believed that G. had authority so to sign. *Held*, no error.

Also, *held*, that it was competent to prove that E. gave credit to H. after the conversation with him above stated.

(Argued April 12, 1876; decided April 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was upon four promissory notes alleged to have been made by defendant Henry Reges and indorsed by defendant Keller, which notes were given to William Elliott for cattle delivered to George Reges, who signed the name of Henry to the notes with the knowledge of Elliott. Keller.

Opinion of the Court, per CHURCH, Ch. J.

indorsed upon the representation of Elliott that the notes were executed by Henry. Elliott transferred the notes after maturity and without consideration to plaintiff. The further facts appear sufficiently in the opinion.

Samuel Hand for the appellant. The referee erred in admitting the evidence as to what Elliott supposed about George's authority to sign Henry's name. (*Nichols* v. *Kingdom Co.*, 56 N. Y., 618.) It was irrelevant to the issue whether Keller had bought cattle through Elliott. (*Green* v. *Disbrow*, 56 N. Y., 334.)

O. Close for the respondent.

CHURCH, Ch. J. Although the general rule is that an indorsement of a promissory note amounts (among other things) to a contract that the instrument itself and the antecedent signatures thereon are genuine (Story on Promis. Notes, § 135), yet I apprehend that no such liability could be enforced by a holder who procured an indorsement upon a forged note with knowledge of the forgery, and upon a representation to the indorser that it was genuine. That is the defence set up in this case as against Elliott, to whom the note was given; and the plaintiff's intestate occupies no better position than he does, having received it without consideration, and after due.

The name of Henry Reges was signed to the note by his brother, George Reges, and was indorsed by the defendant Keller, their brother-in-law, and it was claimed on the trial that the note was signed without authority, with the knowledge of, and at the request of Elliott, the holder, and that the latter procured the indorsement of Keller upon the false representation that Henry's signature was genuine. On the other hand, it was claimed on behalf of the plaintiff, that George Reges, having failed in the butchering business, the same was carried on in the name of Henry, by George, who was fully authorized to make contracts, give notes and, generally, to transact the business as an agent for Henry. The note

was given for cattle purchased for the business carried on by George.

An examination of the case shows a direct and lamentable conflict of evidence between the parties and principal actors in the transaction; the brothers Reges and the defendant Keller maintaining the claim of the defendant, and Elliott corroborated, as to some circumstances, that of the plaintiff. The radical discrepancy between these witnesses as to the material facts within their personal knowledge cannot be attributed to mistake or misrecollection, and the mantle of charity is not broad enough to save some of them from the charge of intentional misstatement. The case furnishes one illustration, among many of daily occurrence in courts of justice, against the policy of allowing interested persons to be sworn in their own behalf, upon the ground that it is a temptation too great for human nature to withstand — a policy as to which there is a diversity of opinion, but with which as a court we have no concern. It is not our province to pass upon the facts. The referee decided in favor of the plaintiff's evidence and found, as a fact, that the notes were made by Henry Reges. This finding will be sustained if George Reges had authority to sign Henry's name; and if there is any legal evidence justifying the referee in finding the fact of George's authority the judgment will be sustained, even though we might, upon the evidence, come to a different conclusion. I have carefully examined the evidence and I think there is enough to justify the finding. It tends to show that, when George failed, Henry bought the establishment and authorized George to carry on the business in his name; that he told Elliott that he would be responsible for all cattle sold to George, as he was carrying on the business; that the giving of notes was necessary and had been customary in purchasing cattle; that the defendant knew all the facts, and indorsed a large number of notes, knowing that they were signed in the same way. From these general facts the referee might infer an authority to give notes and do any thing necessary and usual in prosecuting the business; and, for the purpose of passing upon this question,

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we must assume that the referee gave credit to the witnesses who testified on behalf of the plaintiff.

The exception to the decision overruling the objection to the question to Elliott, whether he supposed and believed, at the time George signed Henry's name to the notes, that George had authority to thus sign them, is not tenable. The defendants had before put in evidence tending to prove that Elliott requested Henry to sign the notes, knowing that he had no authority. The fact of authority was sought to be proved by circumstances which were not conclusive and might be true, and yet Elliott might know that no authority existed. To rebut such an inference it was competent to ask what the fact of his belief was at the time. It was not competent upon the question of authority, but if it was competent for any purpose it was sufficient. 56 New York, 618, is not applicable.

The fact that Elliott gave credit to Henry for cattle, after the conversation, was also competent; it showed that he acted upon the authority Henry had given him, and tended to corroborate the fact of such authority. The two other exceptions were not well taken. The evidence tended to show the manner in which cattle were purchased, and that the defendant was concerned in different ways in purchasing them for Reges.

The judgment must be affirmed.

All concur.

Judgment affirmed.

WILLIAM H. POPHAM, Appellant, *v.* WILLIAM A. COLE et al., Survivors, etc., Respondents.

To entitle a party to relief for an alleged infringement of a trade-mark, the resemblance of the simulated to the genuine trade-mark must be such as to amount to a false representation, which is liable to deceive the public and enable the imitator to pass *off* his goods as those of the person whose trade-mark is imitated. When ordinary attention on the part of customers will enable them to discriminate between the trade-marks of different parties, the court will not interfere.

Statement of case.

Plaintiff, a dealer in refined lard, stamped upon the cans in which it was put up for sale the figure of a large fat hog, which he claimed as a trade-mark; above the figure was his own name and the words "prime leaf lard." Defendants, who were engaged in the same business, under the firm name of "H. J. Wilcox & Co.," stamped upon their packages a globe, with a small, gaunt wild boar on top. Over this was the firm name, and below it the words "prime leaf lard." The letters and arrangement of the two were entirely different. In an action to restrain the use of the figure of a hog, to which the plaintiff claimed the right to exclusive use, as a trade-mark, *held*, that no fraudulent, deceptive imitation was established, as there was no such resemblance between the two devices or symbols as to deceive a purchaser of ordinary caution; that neither defendant's device alone, nor that in connection with his entire brand and mark, amounted to a representation, direct or indirect, that the article they sold was manufactured by plaintiff; and that, therefore, the action was not maintainable.

As to whether plaintiff could appropriate to his own use, as a trade-mark, the picture of the animal from which not only his own, but the lard of all other dealers and manufacturers is derived, particularly when the same symbol has been used indiscriminately by dealers in lard and other products of the slaughtered animal, *quære*.

(Argued April 13, 1876; decided April 25, 1876.)

APPEAL from order of the General Term of the Superior Court of the city and county of New York reversing a judgment in favor of plaintiff, entered upon a decision of the court at Special Term. (Reported below, 6 J. & S., 274; 14 Abb. [N. S.], 206.)

This action was brought for an alleged infringement of plaintiff's trade-mark.

Plaintiff was engaged in the business of refining and packing lard for transportation, as was also the defendants. Plaintiff claimed the exclusive right to use in his business, as a symbol or device, the figure of a hog, and asked that defendants be restrained from using any brand, device or mark representing the figure of a pig or hog, on any lard or package of lard put up or sold by them.

The facts as found and as appear by the exhibits were in substance as follows:

For more than the twenty-five years prior to this action,

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large quantities of lard in a crude or natural state have been sent from other parts of this country to New York and there dealt in as articles of trade and commerce, and during that time there has been in the city and neighborhood a business of refining such crude or natural lard. The product of such business was, among other names, called refined lard. Refined lard is whiter and harder than crude or natural lard, and better fitted to be sent to hot climates; but refining does not change its appearance, except to the eye of an expert. It had a better price in market. The best quality both of crude lard and of refined lard has been commercially known as prime leaf lard. During that time the commercial demand for refined lard has been for the purpose of shipping it to or through tropical climates, and of crude lard for the purpose of supplying other markets. Refined lard has been packed for exportation in tin and wooden vessels, but mostly in tin.

The plaintiff has been for fifteen years before this action in the business of making and selling refined lard, and during that time has in that business packed the lard made by him for sale in tin cases and pails, and in wooden kegs, tubs, barrels and tierces, and habitually and generally stamped or painted upon such packages a figure of a swine, together with words showing the quality of the lard, and his name and place of business. The figure thus used by the plaintiff represents a large, fat hog. Above it was plaintiff's name and the words "pure leaf lard."

The figure of a hog had been used by other persons engaged in selling refined lard, but had not been used in the trade upon tin vessels containing refined lard. During the last fifteen years, in many instances, barrels and tierces and other wooden vessels, containing natural or crude lard or some parts of the hog, as ham or bacon, on which vessels were painted or stencilled the figure of a pig or hog, have been sent in the usual course of trade by various persons in the west and other parts of this country to this city and here dealt in. In trade, such crude or natural lard or parts of the hog have not been into market here in tin cases or packages. For some years

Statement of case.

before the bringing of this action the refined lard made and sold by the plaintiff has been in trade in this city, and in foreign places to which it was exported, generally known and recognized and distinguished from the refined lard made by others by the figure of the pig or hog placed upon it by him as stated above, and it was commercially spoken or written of as lard, of Popham's pig brand or of the pig brand. In the autumn of 1872 the defendants were refiners of lard in this city, and having sold a large quantity of lard for exportation to South America, packed such lard in tin vessels of the size and form usual in the trade, and upon such vessels, together with their firm name, to wit, "W. J. Wilcox & Co.," place of business and words signifying the quality of the lard, placed the figure of a swine. Beneath this figure they also placed the figure of a sphere or hemisphere, upon which the hog was represented as standing. The figure of the swine was smaller than that used by plaintiff, and was so shaped as to represent a wild boar, gaunt and thin. The firm name was above the device and below it the words "prime leaf lard." The letters were of different size and entirely different.

As conclusions of law the court found that the plaintiff has the exclusive right to use upon packages of refined lard made by him the said figure or mark of the swine, and that the defendants have not the right to place or use upon packages of refined lard the figure or mark of a swine; that the defendants should be perpetually restrained and enjoined from using or placing upon packages of refined lard not made by plaintiff the figure of a swine, as above found to have been used by them, or any imitation or likeness of the figure of a swine, used by the plaintiff as above found.

Judgment was entered accordingly.

S. F. Cowdrey for the appellant. Plaintiff had a right of property in the figure of a hog and the words "pig brand" used by him as a trade-mark, and was entitled to be protected in the use of them. (*Fettridge* v. *Wells*, 4 Abb., 146; *Gillott* v. *Esterbrook*, 48 N. Y., 379; *Amosk. Mfg. Co.* v. *Spear*, 2

Sandf., 605; *Stokes* v. *Landraff*, 17 Barb., 612; *Bloss* v. *Bloomer*, 23 id., 609; *Clark* v. *Clark*, 25 id., 79; *Bklyn. W. L. Co.* v. *Masury*, id., 418; *Howard* v. *Henriques*, 3 Sandf., 727; *McAndrews* v. *Bessett*, 10 L. T. R., 443; *Serxo* v. *Provezendo*, 1 L. R., Ch., 197; *Caswell* v. *Davis*, 58 N. Y., 234; *Taylor* v. *Gillies*, 59 id., 334; *Popham* v. *Wilcox*, 14 Abb. [N. S.], 206; Wil. Eq., 206; *Taylor* v. *Carpenter*, 11 Paige, 292; *Burnett* v. *Phalon*, 42 N. Y., 594; *Filley* v. *Fassett*, 44 Mo., 168; *Edelstein* v. *Edelstein*, 1 DeG., J. & S., 185.) If, in the imitation of a trade-mark, there is such a resemblance to the original as is calculated to mislead purchasers, it is a violation of it. (*Knott* v. *Morgan*, 2 Keene, 213; *McCartney* v. *Garhart*, 45 Mo., 593; *Lockwood* v. *Bostwick*, 2 Daly, 521; *Williams* v. *Johnson*, 2 Bosw., 1; *Partridge* v. *Menck*, 2 Barb. Ch., 101; *Swift* v. *Day*, 4 Robt. 611; *Matsell* v. *Flanagan*, 2 Abb. [N. S.], 459; *Bininger* v. *Wattles*, 28 How., 206; Upton on Trade-marks, 221.)

Wm. F. Shepard for the respondents. Plaintiff had not an exclusive right to use the symbol of a hog as a trade-mark. (*Gillott* v. *Esterbrook*, Cox Am. T. M. Cas., 347; *Stokes* v. *Landgraff*, 17 Barb., 608; *Wolfe* v. *Goulard*, 18 How. Pr., 64; *Bininger* v. *Wattles*, 28 id., 206; *Corwin* v. *Daly*, 7 Bosw., 222; *Caswell* v. *Davis*, 58 N. Y., 223.) There was no such similarity between the two brands or labels as to entitle plaintiff to the relief demanded. (*Amosk. Mfg. Co.* v. *Spear*, 2 Duer, 607; *Swift* v. *Day*, 4 Robt., 611; *Snowden* v. *Noah*, Hop. Ch., 347; *Partridge* v. *Menck*, 2 Sandf. Ch., 101; 2 Barb. Ch., 101; *Colloday* v. *Baird*, 4 Phil., 139; *Stephens* v. *De Gonto*, 7 Rob., 343; *Rowley* v. *Houghton*, 2 Brews. [Penn.], 303; *Mer. Mfg. Co.* v. *Am. L. C. Co.*, Cox Am. T. M. Cas., 707; Brown on T. M., § 333.)

ALLEN, J. The evidence is that the imprint or picture of a hog has been used for many years by dealers in the different products of that animal, as ham, bacon and lard, by being painted or stenciled upon the packages containing those dif

ferent articles; but it would seem that it was first used by being printed or stamped upon packages of refined lard by the plaintiff. That article does not differ essentially in appearance from crude lard, and the two can only be distinguished by experts. The refining of lard for market is of comparatively recent origin, and the process is principally resorted to when the lard is intended for shipment to warm climates. The sign or symbol may be employed with equal truth in respect to any parts of the dead swine or the products of that animal put up for sale, and no one dealer has a greater right than any other to appropriate it to his own purposes. A serious question might be made as to the right of the plaintiff to appropriate to his exclusive use as a trade-mark the picture of the animal from which not only his lard but the lard of all other dealers and manufacturers of lard is derived, especially when the same emblem or symbol has been used by dealers in lard and other products of the slaughtered hog indiscriminately as they have had occasion. But, passing this question, there are other difficulties in the plaintiff's case which are insuperable.

The judgment, which was reversed at General Term, in substance, declared the brand or mark used by the defendants representing the figure of a hog or pig upon their packages of lard, was a fraudulent imitation of the figure of the same animal, adopted and used by the plaintiff as a trade-mark, calculated to deceive; and adjudged that the plaintiff was entitled to the exclusive use of the symbol as a trade-mark upon lard, and perpetually enjoined the defendants from using or placing such symbol or device upon any package of lard traded in or put up or sold by them.

The imitation of a trade-mark with a design to deceive the public, and which is liable to deceive them and enable the imitator to pass off his goods as those of him whose trade-mark is imitated, is a fraud upon the latter and a false representation to the public, and the injured party may have relief to the extent that the imitation is deceptive and liable to mislead. The purpose of all fraudulent imitations of trade-marks

is to impose the goods of the fraudulent actor upon the public as those of the owner of the mark, and when the imitation is such that the success of the design is probable, a court will interfere by injunction and grant relief against the fraud. But to entitle a party to relief the resemblance of the simulated to the genuine trade-mark must amount to a false representation of the facts indicated by the genuine mark, that is, of the manufacture or proprietorship of the article. (*Amoskeag Manuf. Co.* v. *Spear*, 2 Sand. S. C. Rep., 599.) Words or phrases which indicate the character, kind, quality and composition of an article of manufacture cannot be appropriated by the manufacturer to his own use as a trade-mark. (*Caswell* v. *Davis*, 58 N. Y., 223; *Taylor* v. *Gillies*, 59 id., 331.) There is no objection taken to any part of the brand or label of the defendants save only the exhibition thereon of the figure of a wild boar. Every other part of it descriptive of the article, "prime leaf lard," and the names of the manufacturers, "W. J. Wilcox & Co.," although in substance the same as that upon the plaintiff's brand or mark, except that the latter has his own name thereon as the manufacturer, is conceded to be innocent and lawful. The defendants' trade-mark is not the same as that used by the plaintiff. They have upon their packages the imprint of an animal of the same genus as that appearing upon the plaintiff's packages, but entirely unlike in appearance and characteristics, and placed upon a globe, which does not appear as a part of the plaintiff's trade-mark. The question in this, as in every other case, is, whether there is such resemblance between the two as to deceive a purchaser using ordinary caution. The difference is so palpable here that no one can be deceived. The shape and general appearance of the pictured animals upon the two brands and their position, the one upon a globe and the other without such support; the one representing a small, lank and lean wild boar, and the other, a large, fat, well-conditioned domestic animal, are so entirely dissimilar that the one can hardly be said to be an imitation of the other, and clearly not a fraudulent or deceptive imitation. The brands and letter-

ing descriptive of the article, and giving the names of the plaintiff, and defendants, respectively, as manufacturers, are entirely unlike in arrangement, size of the letters, and general form and appearance, insomuch that no one could mistake the packages of the defendants for those of the plaintiff. It is said by Lord CRANWORTH, in *The Leather Cloth Company* v. *The American Leather Cloth Company* (11 House of Lords Cases, 522), that the gist of the complaints in all these cases is that the defendant, by placing the plaintiff's trade-mark on goods not manufactured by the plaintiff, has induced persons to purchase them, relying on the trade-mark as proving them to be of the plaintiff's manufacture, and that this necessarily supposes some familiarity with the trade-mark. We may say in this case, as was said by the court in that, that to any one at all acquainted with the plaintiff's trade-mark there could not be, even on the most cursory glance, any deception. There was no representation, direct or indirect, by the use of the device or symbol, whether by itself or in connection with the entire brand and mark of the defendants, that the article which they sold was manufactured by the plaintiff. The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade-marks used by different parties. The maxims "*Vigilantibus non dormientibus leges subserviunt*," was applied by Lord CRANWORTH in the case last cited, and the principle was affirmed in *Partridge* v. *Menck* (2 Sand. Ch., 622), affirmed by the chancellor (2 Barb. Ch., 101), and in this court, but not reported; see, also, *Snowden* v. *Noah*, (Hop. Ch. R., 396); *Stokes* v. *Landgraff* (17 Barb., 608).

The order granting a new trial must be affirmed, and judgment absolute for the defendants.

All concur.

Order affirmed, and judgment accordingly.

Statement of case.

HELEN H. VAN KEUREN, by Guardian, etc., Appellant, v. MARGARET CORKINS et al., Respondents.

A payment upon a bond and mortgage made by the mortgagor to the mortgagee, after an assignment thereof by the latter, when made in good faith, without notice, actual or constructive, of the assignment, is valid.

The fact that payment was made before due is no evidence of bad faith; nor is a want of good faith to be inferred from the facts that the bond and mortgage were not produced and payment indorsed thereon when made; or were not produced when payment in full was made, and satisfaction of the mortgage executed, or that no inquiries were made in regard to them; a failure to produce the instruments is not sufficient to put the mortgagor upon inquiry.

A receipt given by the mortgagee at the time of payment is proper evidence in an action by an assignee, as part of the *res gestæ*.

Where a mortgage which has been assigned, but the assignment not recorded, is satisfied of record by the mortgagee, a subsequent mortgagee is a "subsequent purchaser," within the recording act (1 R. S., 762; §§ 37, 38); and as to him the assignment is void.

(Argued April 14, 1876; decided April 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a decision in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 4 Hun, 129.)

This was an action to foreclose a mortgage executed September 1, 1865, by Michael Corkins and wife, to secure a bond of said Corkins given to Thomas George and Enoch Carter.

On the 20th June, 1866, said bond and mortgage were assigned by the mortgagees to one John Hill, Jr., and through various intermediate assignments were transferred to plaintiff. None of the assignments were recorded until after August, 1874. Corkins made various payments to George, one of the mortgagees, some of them before due, and in July, 1868, paid the balance unpaid in full; and thereafter, in January, 1871, the

mortgagees executed a satisfaction, which was duly filed, and the mortgage satisfied of record. The papers were not produced at the times of payment, or at the time the satisfaction-piece was given, and it does not appear that any inquiries were made in reference thereto. Receipts were given for the various payments when made. These were offered in evidence, were objected to, and received under objection and exception.

The court found that, "all of said payments were made by said Corkins, without any knowledge or notice whatever that said George and Carter had ever assigned or transferred the said bond and mortgage to any person whatever."

On November 12, 1870, the defendant The Newburgh Savings Bank loaned to Corkins $1,000, and took, as security, a mortgage on said premises, which mortgage was duly recorded November 14, 1870. Previous to making such loan, said bank caused the records to be searched, and made such loan relying on the facts that the premises were unincumbered, and without any knowledge or notice whatever of the mortgage mentioned in the complaint. The bond mentioned in the complaint remained in the actual possession of said Thomas George until as late as March 25, 1870.

Gilbert O. Hulse for the appellant. Evidence of payment made by the mortgagor to one of the mortgagees after the assignment and the receipts of the mortgagees and the satisfaction-piece made by them were improperly received in evidence. (*Paige* v. *Cagwin*, 7 Hill, 361; *Foster* v. *Beals*, 21 N. Y., 247; *Brown* v. *Blydenburgh*, 3 Seld., 141.) The payments made by the mortgagor, although made in good faith and without notice of the assignment, and subsequent thereto, are not a bar to a recovery herein. (Edw. on Bills, §§ 548, 576; *Mfg. Co.* v. *Reynolds*, 2 Hill, 140; 4 Mass., 372; 14 Grat., 1; *Brown* v. *Blydenburgh*, 7 N. Y., 141; *Foster* v. *Beals*, 21 id., 251, 252; *Kellogg* v. *Smith*, 26 id., 18, 23, 25; *Purdy* v. *Huntington*, 42 id., 334, 339; *Doubleday* v. *Kress*, 50 id., 410; Jeremy's Eq. Jur., 282; Willard's Eq. Jur., 446; *Martin* v.

Hawkes, 15 J. R., 405; 12 id., 343; 19 id., 96, 97; *Wilkins* v. *Batterman*, 4 Barb., 47; *Reed* v. *Marble*, 10 Paige, 409; *N. Y. L. and T. Co.* v. *Smith*, 2 Barb. Ch., 82; *James* v. *Morey*, 2 Cow., 288; Story on Ag., § 98.) In the absence of a finding that the payments by the mortgagor were made in good faith, plaintiff is entitled to recover. (*Foster* v. *Beals*, 21 N. Y., 252; *Purdy* v. *Huntington*, 42 id., 339.) Defendant The Newburgh Savings Bank is not entitled to precedence over plaintiff's mortgage. (*Raynor* v. *Wilson*, 6 Hill, 469; *N. Y. L. Ins. Co.* v. *Smith*, 2 Barb. Ch., 82; 42 N. Y., 334–339.) The act of George in giving the satisfaction is a nullity. (7 N. Y., 141, 145; 26 id., 18; 50 id., 416.)

Samuel Hand for the respondents. The payments made by the mortgagor to George were valid payments on the bond and mortgage, and extinguished it. (1 R. S., 763, § 41; 2 Sandf. Ch., 325; *Foster* v. *Beals*, 21 N. Y., 247; *James* v. *Morey*, 2 Cow., 288; *Reed* v. *Marble*, 10 Paige, 409; *N. Y. L. and T. Co.* v. *Smith*, 2 Barb. Ch., 82.) The Newburgh Savings Bank having no notice of the assignment of the mortgage, had a right to rely on the records. (1 R. S., 762, §§ 37, 38; *Ely* v. *Schofield*, 35 Barb., 330.) The receipts of George were properly received in evidence. (*Bk. of Monroe* v. *Culver*, 2 Hill, 531.) The assignees of the mortgage, by leaving it with George, and by receiving payments only through him, constituted him their agent to receive payment of the mortgage, and are bound by his acts. (*Williams* v. *Walker*, 2 Sandf. Ch., 325.)

MILLER, J. The payments of the mortgagor to the mortgagees were clearly made without any knowledge of the mortgagor that the bond and mortgage had been assigned. The case is utterly destitute of any evidence showing that the mortgagor had notice of the assignment of the bond and mortgage, or that he had any reason to believe that the same had been transferred to another person. He most manifestly acted in good faith in making the payments; and no circum-

stances are proved to exist which demanded of him any greater degree of vigilance than was manifested or that created suspicion which should have put him upon inquiry. The assignments were not put on record, so as to give notice to the mortgagor. But even if such had been the case the mortgagor was entitled to protection under the statute, which provides that the recording of an assignment shall not, of itself, be deemed notice of the same to a mortgagor, so as to invalidate any payment made. (1 R. S., 763, § 41.) It is a well established rule that the assignee of a bond and mortgage, if he wishes to protect himself against *bona fide* payments by the mortgagor to the mortgagee, must notify the mortgagor of the assignment. (*Reed* v. *Marble*, 10 Paige, 409; *James* v. *More*, 2 Cow., 258; *N. Y. Life Ins. and T. Co.* v. *Smith*, 2 Barb. Ch., 82.) The rule stated is a salutary one, and protects the rights of parties affected by an assignment from fraud or imposition. It is true, where actual notice is not given, if the circumstances under which the payments are made are such as to show constructive notice, the mortgagor may be chargeable with notice of the transfer.

The evidence discloses no facts which authorize the conclusion that the mortgagor, in any way, had notice or knowledge which should have induced him to forego the payments which he made. There was no suspicious circumstance within the rules, as to notice, which is established by the recording act, as well as upon equitable principles, which was sufficient to put him upon inquiry, or involved a question as to his good faith. The mortgagor was justified in making payment before the money was due; and this circumstance furnishes no ground for assuming that he was bound to make inquiry, or that he acted in bad faith. Nor is a want of good faith to be inferred because the bond and mortgage were not produced when the payments were made, and the payments indorsed thereon, nor any inquiries made in regard to the same. The possession of the securities is an important circumstance when the payment is made to the agent or attorney (2 Sandf. Ch. R., 325); but it is by no means controlling

when they are made to the mortgagee. In such a case a failure to produce the bond and mortgage was held to be insufficient, as a matter of law, to put the mortgagor upon inquiry. (*Foster* v. *Beals*, 21 N. Y., 247.) It is true that in the case cited there was a suggestion of a false reason to excuse their production; but this does not affect the principle; and, as was there said in the opinion, the true question is always one of good faith. Besides, there was evidence to show that George had possession of the bond and mortgage, and the judge found, with sufficient evidence to warrant the conclusion, that George had possession of the bond at the time of the payment.

The case of *Brown* v. *Blydenburgh* (7 N. Y., 141), and that of *Kellogg* v. *Smith* (26 id., 18), have no application to a case of payment, nor do any of the authorities cited sustain the position that mere non-production of the bond and mortgage, or a want of inquiry, under circumstances like those which are here presented, show bad faith. The observations the court made in the case last cited are also applicable to the non-production of the bond and mortgage when this mortgage was satisfied.

None of the exceptions to the refusal of the judge to find are well taken; nor was there any error in any of the findings made. Such of the findings excepted to as are at all material, are sufficiently considered and properly disposed of in the opinion of the General Term.

There is no force in the objections made to the admission of evidence. The receipts were properly received in connection with the evidence of payments. They were admitted as a part of George's testimony under the stipulation; and it was proper to show that receipts were given, as a part of the *res gestæ*. (*Bank of Monroe* v. *Culver*, 2 Hill 531.)

The finding of the judge that Corkins paid the balance in full then due and unpaid, is sustained by proof, accompanied by a receipt for the same to that effect. A mere computation that this is incorrect, without proof to establish its accuracy, is not sufficient to authorize the conclusion that the finding

was erroneous. While a new trial might, perhaps, have been granted by the General Term for a supposed error thus presented, it is not within the province of this court to interfere for any such reason. No exception was taken to the findin of fact, upon the trial, and no question raised on that subject, and it may properly be assumed that the evidence was sufficient to establish the correctness of such finding. Under no circumstances could the rights of the Savings Bank of Newburgh be affected by any such alleged error.

So far as the rights of the Savings bank are in controversy they had a right to rely upon the records. To all intents and purposes they were subsequent purchasers, in good faith, under the statute (1 R. S., 762, §§ 37, 38); and the assignments of the bond and mortgage not having been recorded, they were void as to such purchasers. (1 R. S., 756, § 1; 762, § 38.)

No other question arises which demands comment; and as the case was properly disposed of in the court below, the judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

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HERMAN RICE et al., Appellants, *v.* WILBUR J. MANLEY, Respondent.

One S. had contracted, by parol, to sell and deliver to plaintiffs a quantity of cheese, but being made to believe, by the fraud of defendant, that plaintiffs did not want the cheese, sold it to defendant. The contract was not binding under the statute of frauds, but would have been performed by S. had it not been for the fraud. *Held*, that an action was maintainable against the defendant therefor.

Dung v. *Parker* (52 N. Y., 494) distinguished.

The cheese was contracted for by plaintiffs for the New York market. It was proved that the only market for cheese in C. county, where the cheese was to be delivered, was for transportation and sale in said city of New York; and that its market-price controlled the price in C. county. *Held*, that it was competent, on the question of damages, to prove the value of the cheese in New York, and the cost of transportation thither.

Rice v. *Manley* (2 Hun, 492) reversed.

(Argued April 14, 1876; decided April 25, 1876.)

Opinion of the Court, per EARL, J.

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 2 Hun, 492.)

This was an action for fraud. The facts sufficiently appear in the opinion.

Wilkes Angel for the appellants. Fraud, accompanied by damage, makes a cause of action. (*Pasley* v. *Freeman*, 3 T. R., 51; *Upton* v. *Vail*, 6 J. R., 181; *White* v. *Merritt*, 7 N. Y., 352, 357; 2 Wend., 385; 38 Barb., 210; 1 Kent's Com., 478.) It was proper to prove the value of the cheese in New York. (*Durst* v. *Burton*, 47 N. Y., 175; *Marshall* v. *N. Y. C. R. R. Co.*, 45 id., 502; *Richmond* v. *Bronson*, 5 Den., 55; *Wemple* v. *Stewart*, 22 Barb., 154; *Harris* v. *Pan. R. R. Co.*, 58 N. Y., 660.) Plaintiffs were entitled to recover the profits they might have made. (*Messmore* v. *S. and L. Co.*, 40 N. Y., 422; *Griffin* v. *Culver*, 16 N. Y., 489; *Heineman* v. *Heard*, 50 id., 27; Sedg. on Dam., 80*, note; *St. John* v. *Mayor, etc.*, 13 How. Pr., 527; 6 Duer, 315.)

J. R. Jewell for the respondent. The contract was void by the statute of frauds and cannot be enforced directly or indirectly. (*Dung* v. *Parker*, 52 N. Y., 494; *Cagger* v. *Lansing*, 43 id., 550; *Levy* v. *Brush*, 45 id., 589.) The measure of damages is the difference between the contract-price and the actual market value of the cheese at the time and place of delivery. (*Pumpelly* v. *Phelps*, 40 N. Y., 59; *Bush* v. *Cole*, 28 id., 261; *Hubbell* v. *Meigs*, 50 id., 480; *Maserton* v. *Mayor of Bklyn.*, 7 Hill, 61; 4 Den., 554; 1 N. Y., 305.)

EARL, J. The plaintiffs had made an agreement with one Stebbins to purchase from him a large quantity of cheese, to be delivered at a future day, at Cattaraugus station, Cattaraugus county. There had been no compliance with the statute of frauds so as to make the agreement binding upon either party, but both parties would have performed it but

for the fraud of the defendant. The defendant knowing of the agreement, for the fraudulent purpose of defeating its performance by Stebbins, of depriving the plaintiffs of the benefit thereof, and of himself obtaining the cheese, caused a telegraphic dispatch to be sent to Stebbins, signed by the name of E. Rice, which he meant Stebbins should understand to be the name of one of the plaintiffs, to the effect that he could sell the cheese and plaintiffs did not care for it. He took the dispatch from the telegraph office and carried it to Stebbins, and by this fraud induced Stebbins to sell and deliver the cheese to him before the day of delivery to the plaintiffs arrived. The referee held that defendant was liable to the plaintiffs for the damages sustained by them in consequence of this fraud; but the General Term reversed the judgment, holding, upon the authority of the case of *Dung* v. *Parker* (52 N. Y., 494), that the plaintiffs could recover no damage, because the agreement for the sale of the cheese to the plaintiffs, by Stebbins, was void by the statute of frauds.

It was said by COKE, J. (in 3 Bulst., 95), that "fraud without damage or damage without fraud, gives no cause of action; but when these two concur an action lies." This language has been frequently quoted with approval by judges and text writers, and the rule as thus laid down is generally applicable to the multifarious forms of fraud which come before the courts. Fraud and falsehood are *mala in se*, and wrongful in the eye of the law, so that if damage results therefrom there is the damage and wrong necessary to create a cause of action. (Ad. on Law of Torts, 25.) In 2 Hilliard on Torts, 75, the learned author lays down the rule as follows: "In order to maintain an action for fraud, it is sufficient to show that the defendant knowingly uttered a falsehood with the design to deprive the plaintiff of a benefit and acquire it to himself;" and it must also be added that plaintiff was deceived and damaged.

What difference can it make that plaintiffs could not enforce their agreement against Stebbins? The referee found that Stebbins would have performed the agreement and that

plaintiffs would have had the benefit of it but for the fraud of the defendant. How, then, can it be said that plaintiffs were not damaged; that there was not both fraud and damage, so as to satisfy the rule above laid down? Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A a legacy, and was prevented from doing it solely by the fraud of B; in such case, while A has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B, depending upon the facts of the case. (Kerr on Frauds, 274, and cases cited; Bacon Ab., Fraud, B.) Suppose A made a parol contract with B for the purchase of land, and B is ready and willing to convey, but is prevented from so doing by the fraudulent representations of C as to A, by which B is deceived and induced to convey to C; in such case, although A could not have compelled B to give him the conveyance, it would be a reproach to the law to hold that C would not be liable to A for the damage caused by the fraud.

The case of *Benton* v. *Pratt* (2 Wend., 385) is quite in point, and is conceded by the learned judge who wrote the opinion of the General Term to be a controlling authority for the maintenance of this action if not overruled. In that case Seagraves & Wilson, of Allentown, Penn., had made a contract with the plaintiffs to purchase of him, to be delivered at a future day, twenty hogs, nothing having been done to make the contract binding within the statute of frauds. While the plaintiff was driving his hogs and thus preparing to perform his contract, the defendants, knowing the facts, drove their hogs to Allentown, and fraudulently represented that plaintiffs did not intend to deliver his hogs to Seagraves & Wilson, and thus induced them to buy their hogs; and when plaintiff arrived with his hogs, Seagraves & Wilson refused to take them solely because they had a full supply. That was a case

where the plaintiff could not have enforced his contract against Seagraves & Wilson, and yet the court held that he could maintain an action of fraud against the defendants for damages sustained on account of the fraud. Judge SUTHERLAND said: "There is the assertion on the part of the defendant of an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive and material injury resulting therefrom to the plaintiff. This is sufficient to sustain the action." He also said: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding upon them or not, the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendants."

In *Snow* v. *Judson* (38 Barb., 210), it was held that false statements made by an individual in regard to articles manufactured by others, for the purpose of preventing sales by them of such articles, which do in fact prevent such sales and injure the manufacturers in their business, constituted a cause of action. It has been held in many cases that a false representation, made with intent to injure one, and in relying on which he is injured, is a good cause of action, although no benefit accrues to the party making it, from the falsehood. (*Pasley* v. *Freeman*, 3 Term R., 51; *White* v. *Merritt*, 7 N. Y., 352.) In the latter case it is said that the action will lie whenever there has been the assertion of a falsehood with a premeditated design, as to a fact, when a direct and positive injury arises from such assertions; and *Benton* v. *Pratt* is cited as authority. In *Green* v. *Button* (2 C. M. & R., 707) the plaintiff had made a contract for the purchase of spruce battens for £11; upon the case, as presented to the court, the battens had not been delivered or paid for. The defendant, who had loaned the plaintiff the money to pay for the battens, went to the sellers and falsely and fraudulently represented, among other things, that he had a lien on the battens, and ordered and directed them not to deliver them. The sellers, being deceived by the representations, were induced not to deliver the battens, and the plaintiff suffered damage; and

it was held that an action for the fraud could be maintained, although the sellers were under no obligation to deliver the battens.

The mere forms adopted for the perpetration of frauds are of little importance; it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced to produce the injury, or whether it be direct or indirect in its consequences. Schemes of fraud may be so cunningly devised as to elude the eye of justice, but they must not escape condemnation and reparation when discovered.

The case of *Dung* v. *Parker* is not in conflict with these views, and it was not there intended to overrule the case of *Benton* v. *Pratt.* In that case the defendant falsely represented that he had authority to lease, as agent for another, certain premises, and as such agent he contracted by parol to lease the premises to the plaintiff for the term of two years; in consequence of which plaintiff incurred expense to procure fixtures to fit up the premises. It was held that the plaintiff could not recover. In that case the parol lease was void under the statute of frauds, and if the defendant had possessed full authority to lease the premises, or if the contract had been made directly with the owner of the premises, it would have been without legal force or validity; and it was upon this ground that plaintiff was defeated. The rule was laid down, "that an agent, who falsely represents his authority to make a contract on behalf of another, is not liable in contract or tort, unless the principal would have been bound by the contract made if the agent had such authority." There was no proof that plaintiff could have procured a valid lease. But if it had been shown that the owner had agreed to give the lease and was willing to do so, and was prevented by the fraud of the defendant, a case would have been presented like this, and a different result would have been reached.

This cheese was contracted for by plaintiffs for the New York market, and it was proved that the New York market

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for cheese controls the price of cheese in Cattaraugus county. The only market for cheese in that county was for transportation to, and sale in, New York; hence it was competent to prove the value of this cheese in New York, and the cost of transportation there, with the view of placing before the referee facts which would enable him to estimate plaintiffs' damage. (*Durst* v. *Burton*, 47 N. Y., 167; *Harris* v. *Panama Railroad Co.*, 58 id., 660; *Griffin* v. *Colver*, 16 id., 489; *Heinemann* v. *Heard*, 50 id., 27.)

The order of the General Term must be reversed, and judgment upon report of referee affirmed, with costs.

All concur.

Order reversed, and judgment accordingly.

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RICHARD D. KELLOGG, Appellant, *v.* CURTISS THOMPSON et al., Respondents.

In an action, commenced in 1873, against commissioners and an overseer of highways for damages alleged to have been sustained by turning the waters of a stream from a highway upon plaintiff's adjoining premises, it appeared that originally the stream crossed the highway on to said premises, then, turning, recrossed the highway. About 1850, an artificial channel was made, proceeding a short distance from the first crossing, along the side of the traveled track of the highway, and thence through an artificial ditch on to and over plaintiff's land. In 1864, plaintiff, as overseer of highways, extended the artificial channel along the highway until it intersected the original stream, he also filled up the artificial channel on his land; the waters injured the highway, rendering it at times impassable, and defendants turned them into the original channel. *Held*, that the first change did not relieve plaintiff's land from the burden of the stream, or give him any prescriptive right to have it flow along the highway; that, as overseer, he had no right to relieve his own premises at the expense of the public; that it was the right and duty of defendants to abate the nuisance caused by the stream obstructing the highway, and they were justified in restoring said stream to its original channel.

It *seems* that a prescriptive right could not have been acquired, as against the public, by a twenty years' flow of the water along the highway

(Argued April 14, 1876; decided April 25, 1876.)

Opinion of the Court, per CHURCH, Ch. J.

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of defendants, entered upon the report of a referee.

This action was brought against defendants, the commissioners and overseer of highways of the town of Leon, Cattaraugus county, for damages alleged to have been sustained by their turning a stream from the highway upon plaintiff's land.

The facts appear sufficiently in the opinion.

J. R. Jewell for the appellant. No one has a right to change the course of a living stream of water and thereby make it overflow the lands of another. (*Moran* v. *McClearns*, 63 Barb., 185; *Bellows* v. *Sackett*, 15 id., 76; *Foot* v. *Bronson*, 4 Lans., 47; *Thompson* v. *Allen*, 7 id., 459; *Clinton* v. *Meyers*, 46 N. Y., 511; *Billington* v. *N. Y. C. R. R. Co.*, 23 id., 42.) The stream having ceased to run in its original channel for over twenty years, all right to have it run in such original channel was lost. (*Moran* v. *McClearns*, 63 Barb., 185; *Marchy* v. *Shutts*, 29 N. Y., 346; *Hammond* v. *Zehner*, 21 id., 118.)

Henderson & Wentworth for the respondents. Defendants had a right to restore the stream to its natural channel. (*Wendell* v. *Mayor, etc.*, 39 Barb., 329; 1 Stat. at Large, 486, § 130.)

CHURCH, Ch. J. The evidence given on the trial is not contained in the case. We must assume, therefore, that the facts proved were sufficient to sustain the findings, and also any additional findings necessary to sustain the conclusion of law not in conflict with the affirmative facts found.

The action is against the defendants, who are commissioners and overseer of highways, for damages in turning a small stream running in an artificial channel in the highway, by the side of the traveled track, on to the plaintiff's land which

abutted thereon. Such stream injured the highway, and at times rendered it almost impassable, and we must presume that the act was necessary for the protection of the highway; and the only question is whether the plaintiff can legally complain. The stream was turned from the highway on to the plaintiff's land at a point where it originally run. The action is sought to be maintained upon the theory that the stream had been turned from the original channel on the plaintiff's land into an artificial channel in the highway, where it had run for more than twenty years, and that the plaintiff was thus rid of the stream by prescription, and was in as favorable a position as if it had never run over his land. I do not think this position can be sustained. In the first place the facts do not sustain it. The road is an east and west road. Prior to 1850 the stream in question crossed it from the south by a sluice, and passed on to plaintiff's land and run northwesterly thereon, and then turned its course to a south-westerly direction, and recrossed the highway through another sluice about seventy rods west from the first one, and thence into another stream. The first change was made in 1850, or 1851, by plaintiff or his grantor, and consisted of making an artificial channel on the north side of the highway for a distance of ten or fifteen rods from the easterly sluice, and thence on to and over the plaintiff's land, through an artificial ditch to the original stream at a point about seventy rods west from the sluice. The stream continued to flow in the artificial channel thus constructed until 1864, and the only use of the highway during this period was the small distance of ten or fifteen rods, and for the remainder of the distance it flowed over the plaintiff's land. The plaintiff was at liberty, on his own land, to use the artificial channel instead of the original bed, but it cannot be said that during that period the plaintiff's land was relieved from the burden (if it is to be so deemed) of the stream. In that respect there was no substantial change. He chose to use one portion of his premises instead of another to pass the water over, but it still remained on his premises, and during this period the prescriptive right

now claimed, of using the highway entirely, can receive no aid. The change and the use of the highway was too slight to make any material difference with the public rights of travel. An infringement so harmless might be permitted without impairing any available remedy for the obstruction afterward caused by turning the stream for the whole distance into the highway. In 1864 the plaintiff, as overseer of highways, extended the artificial channel on the north side, in the highway west about seventy rods, until it intersected with the original stream, but he restricted the sluice in capacity, and dug a deep ditch, or channel, on the south side to within ten feet of the sluice, and the next year, in consequence of the sluice being insufficient to pass all the water, the intervening space on the south side, of ten feet between the sluice and the ditch, was washed out by force of the water, and the stream from that time until 1871, run in such ditch on the south side of the highway. In that year a more capacious sluice was made, and the water turned into it, where it run on the north side of the highway, and along the highway until 1873, when it was turned into the original channel, on plaintiff's land. It will thus be seen that the plaintiff's land has not been relieved of the water for twenty years, but only nine years, from 1864 to 1873. In 1864 it was turned on by the plaintiff ostensibly on the north side, but substantially and evidently by design on the south side, without right or authority. As an overseer of highways he had no right thus to disencumber his own premises at the expense of the public, who could at any time since have turned it back where it belonged, either into the original bed, or the artificial channel on the plaintiff's land. The stream became a public nuisance in obstructing the highway, and it was the right and duty of the public officers to abate it, and they had the right to restore it to its original channel, especially as the plaintiff had filled up the artificial channel on his own land, and if the original channel had become filled up (which is not found) it was the plaintiff's fault, and he cannot complain, He having turned the stream into the highway without legal authority or right, cannot

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object to its restoration. But if twenty years had elapsed, I am not prepared to assent to the position that a prescriptive right could be thus acquired against the public. Although unnecessary to decide the question, it is proper to disclaim any intention to affirm such a doctrine. (Angell on Water Courses, §§ 254, 562, 563.)

The judgment must be affirmed.

All concur.

Judgment affirmed.

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130	383
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148	388
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159	378

WILLIAM H. PARSONS et al., Respondents, v. JAMES SUTTON et al., Appellants.

In an action upon an account for goods sold and delivered, it appeared that the account had been presented to defendants before the commencement of the action. One item they erased, supposing it charged twice; the balance was not objected to; the item, by mistake, was not included in the complaint or bill of particulars, but, upon the trial, the item was proved clearly. At the close of the evidence, plaintiffs' counsel moved to amend the complaint so as to include the item, which was objected to on the ground of surprise; the objection was overruled. *Held*, no error; that defendants could not have been surprised.

In an action upon a contract, defendant has a right to set up as a counter-claim any cause of action arising upon another contract existing in his favor against plaintiff at the commencement of the action.

The measure of damages for breach of a contract to sell and deliver an article of merchandise at a time and place specified, when the purchaser can go into the market and buy the article, is limited to the difference in value between the contract-price and the market-price at the time and place of delivery.

If there is no market, and the article cannot be had there with reasonable diligence, and the vendee has suffered special damages because of, and which are the proximate and natural results of, the vendor's failure, such damages may be recovered.

The special damage in such case must be alleged and set forth in the pleadings of the party.

Plaintiffs contracted to deliver to defendants, by June 2, 1872, a quantity of "plate paper," to print a frontispiece for the July number of a periodical published by defendants. Plaintiffs did not deliver the paper at the time, but had it ready to deliver June 8th, and so notified

Statement of case.

defendants. Defendants had countermanded the order on the seventh, and refused to accept the paper. In an action for other goods sold and delivered, defendants set up the breach of the contract as a counter-claim, alleging that they were unable to print the frontispiece because of the breach, and claiming special damages for the loss of sales and of subscriptions to the periodical, in consequence. Defendants proved that, a day or two after June second, they went to dealers, but could not find similar paper; there was no proof that such paper could not usually be found in the market, or that it could not be manufactured in time, or that defendants could not find paper answering, substantially, the purpose, or that the paper, when ready to be delivered, would not have been as useful as when called for by the contract. *Held*, that defendants were not entitled to special damages; that while they had the right to refuse to accept the paper after the contract time, they could not so refuse and then claim special damage because of inability to procure it.

(Argued April 17, 1876; decided April 25, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of plaintiffs, entered upon a verdict. (Reported below, 7 J. & S., 544.)

The nature of the action and facts are sufficiently set forth in the opinion.

Thomas Darlington for the appellants. Defendants had a right to have their counter-claim determined in this action. (Code, § 150.) It was error to exclude the conversation with one of the defendants, a part of which had been proved by plaintiffs. (*Vibbard* v. *Staats*, 3 Hill, 144; *Nesbit* v. *Stringer*, 2 Duer, 26; *Bearss* v. *Copley*, 6 Seld., 93; *R. P. A. Co.* v. *Warner*, N. Y. W. Dig., 204; *Worrall* v. *Parmelee*, 1 Comst., 521.)

Jno. E. Parsons for the respondents. The evidence offered to sustain defendants' claim of damages by reason of the alleged breach of the contract of April 19, 1872, was properly excluded. (Benj. on Sales, 618; *Barrow* v. *Arnaud*, 8 Q. B., 604, 609; *Clark* v. *Pinney*, 7 Cow., 687; *Dana* v. *Fiedler*, 12 N. Y., 40; *Norton* v. *Wales*, 1 Robt., 561.) A tender of payment

by defendants was a condition precedent to the delivery of the paper. (Benj. on Sales, 557; *Dunham* v. *Pettee*, 4 Seld., 508; *Fickett* v. *Brice*, 22 How., 194; *Anderson* v. *Sherwood*, 56 Barb., 66.) It was not error to exclude proof of damage until the introduction of testimony to make it competent. (*Staring* v. *Bowen*, 6 Barb., 109; *Flynn* v. *Murphy*, 2 E. D. S., 378; *Cass* v. *N. Y. and N. H. R. R. Co.*, 1 id., 522.) The court properly permitted the complaint to be amended so as to include the item of October 8, 1872. (Code, § 173; *Fuller* v. *Roosevelt*, 4 Cow., 144; *Spawn* v. *Veeder*, id., 503; *Melvin* v. *Wood*, 3 Keyes, 533; 1 Burr. Pr., 432.) The court properly refused to permit defendant Franklin to prove that a variance in the weight of the paper would be an injury. (*Gurney* v. *At. and G. W. R. Co.*, 58 N. Y., 358; *Gaylorg Mfg. Co.* v. *Allen*, 53 id., 515; *Beck* v. *Sheldon*, 48 id., 365; *McCornish* v. *Sarson*, 45 id., 265; *Reed* v. *Randall*, 29 id., 358; *Leavenworth* v. *Packer*, 52 Barb., 132.)

EARL., J. The plaintiffs' complaint is for paper of the value of $1,793.93, sold and delivered to the defendants between June 6th and September 20, 1872. The defence is substantially a general denial and two counter-claims. The first counter-claim is for the sum of eighty dollars, alleged to have been paid to the plaintiffs by the defendants about the 10th day of June, 1872, under a mistake induced by plaintiffs' misrepresentations. The second counter-claim is for damages sustained by defendants by a failure on the part of the plaintiffs to deliver to the defendants a quantity of paper which, on the 19th day of April, 1872, they contracted to deliver on the second day of June thereafter. It is alleged that the paper was to be used for the purpose of printing a frontispiece for the July number of "The Aldine," a periodical published by the defendants, and that in consequence of plaintiffs' failure the defendants were obliged to publish "The Aldine" without the frontispiece, and that they "sustained damages to a large amount by reason of the loss of sale of a large number of copies of said 'Aldine' for the month of

July, and of subsequent numbers thereof, and of subscriptions to the same by reason of the injury to the reputation of said publication."

Intermediate the service of the complaint and the service of the answer, a bill of particulars was served by plaintiffs. There was really no dispute upon the evidence that all the paper for which plaintiffs recovered was sold and delivered to the defendants. A short time before the commencement of this suit an account of plaintiffs' claim containing all the items was presented to the defendants, and payment thereof demanded on several occasions. The defendants did not object to any of the items but the last one, and that they erased by drawing a pencil mark across the same, because, as they supposed, it was charged twice; and that item was proved upon the trial by unquestioned evidence, the defendants' receipt showing its delivery. The last item on the account delivered to the defendants was not covered by the complaint, and was not contained in the bill of particulars. At the close of the evidence plaintiffs' counsel asked permission to amend their complaint so that it would include this item omitted by mistake. Defendants' counsel objected, and said that he was surprised by the proposed amendment. The court allowed the amendment. Its power to do so is beyond question. It was in furtherance of justice; the item had clearly been omitted by mistake, and the defendants could not have been surprised or prejudiced, as they had a correct bill of the account with all the items in their possession, and produced it upon the trial.

Hence there was really nothing for litigation upon the trial but the counter-claims. Neither of the counter-claims set up had any connection with the account sued for. The claim for the eighty dollars, grew out of prior deliveries of paper. It appears that some of that paper was short in weight, and that the total amount short on many deliveries amounted in value to eighty dollars. This had been conditionally allowed by plaintiffs, but upon their claim that they ought not to have allowed it, it was refunded by defendants. The defendants

claimed that they refunded or paid it to plaintiffs in consequence of misrepresentations on the part of the plaintiffs. All the facts in reference to it were submitted to the jury under a charge which is not complained of, and they found against the defendants, and their decision is final. I will add here that none of the evidence as to short weights had any reference to the account claimed in this action, but all the evidence on that subject related to the prior accounts upon which the claim of eighty dollars was based.

The judge presiding on the trial took from the consideration of the jury the second counter-claim, on the ground that it arose out of a different contract. He thus clearly placed his decision upon a wrong ground. The plaintiffs' complaint was upon contract, and defendants had the right to set up, as a counter-claim, any causes of action existing in their favor at the commencement of the action arising on any other contract. But it matters not that the judge placed his decision upon a wrong ground if his decision was right. If, upon the whole case, the defendants were not entitled to recover any thing upon this counter-claim, they were not entitled to have it submitted to the jury. The contract and its breach on the part of the plaintiffs were admitted. And the only further question to be determined was one of damages. The ordinary measure of damages in such a case is the difference between the contract-price and the market-price at the time and place of delivery. And this is the measure to be applied in a case where the pleading is in the ordinary form, simply alleging the contract and breach, and claiming the damage. But this is not the only measure of damage to be applied where a buyer sues the seller for a breach of a contract of sale. The buyer may have suffered special damage by the breach which is of such a nature that, under the rules of law, he is entitled to recover it. And in order to recover such special damage he must allege it in his pleading, so that the seller can be prepared to litigate it upon the trial. (Benj. on Sales, 726; *Barrow* v. *Arnaud*, 8 Q. B., 604; *Boorman* v. *Nash*, 9 B. & C., 145; *Crouch* v. *Great Northern Railway*

Co., 11 Ex., 742; *Hoey* v. *Felton*, 11 C. B. [N. S.], 143; *Smith* v. *Thomas*, 2 Bing. [N. C.], 372; *Clark* v. *Pinney*, 7 Cow., 687; *Dana* v. *Fiedler*, 12 N. Y., 40.) In this case the defendants claim that they could not go into the market after plaintiffs' failure and buy such paper as plaintiffs were to deliver for the reason that they could find no such paper in market, and they, therefore, claimed special damages, to wit, loss of sales of the Aldine and of subscriptions to the same by reason of the injury to its reputation, because they were not able to print the frontispiece with the July number. No other special damage was alleged, and none other could, therefore, be proved. Of this alleged special damage there was no proof whatever at the trial, and hence there was no question in reference to it to be submitted to the jury. But the claim is made that proof of the special damage suffered by defendants was improperly excluded; and this claim must be briefly considered. The following questions were put to one of the defendants: "State what was the result upon your business of not furnishing that paper?" "What effect had the failure to furnish that plate upon your business?" These and similar questions were properly excluded. They were too general; not confined to the special damage alleged, and called for opinions rather than facts. Again: "State in what proportion your circulation was diminished in the month of August, 1872, from that of August of the preceding year?" "In August, 1872, was there a failure as compared with the preceding month of that year?" It did not appear that a frontispiece was ever published before. And these and similar questions were properly excluded, as it did not appear how the comparisons called for would show that the diminished circulation was due to plaintiffs' breach of contract.

Defendants' counsel offered to prove by Mr. Sutton that he caused to be printed 2,000 extra copies of the July number to accompany the plate which was to be printed on the paper thus ordered from the plaintiffs, and which they had failed to furnish, and that those copies are now in his possession, and he has been unable to use them at all; also, proposed to show

that those numbers were worth $400; also, proposed to show by him that he printed 2,500 sheets of extracts to accompany that plate and containing notices of it, and which were to accompany the July number, and that owing to the non-receipt of this paper he was unable to print the plate, and that those notices were lost, and that those were worth not less than sixty dollars; also, proposed to show by him that the freight on goods returnable, for want of the plate, was fifty dollars, and that the traveling expenses paid out for his own traveling, with reference to agents in reference to canvassing for this July number, with the plate, was $250. These offers were excluded. As to the 2,000 extra copies there was no evidence and no offer to prove that defendants were unable to use or sell the extra copies because they were unable to publish a frontispiece in the July number. The other items of damage were no part of the special damage alleged.

I have thus far, in disposing of these exceptions relating to the damages, assumed that the damages alleged and attempted to be proved were properly attributable to plaintiffs' breach of contract. But I am clearly of opinion that defendants are not entitled to this assumption. The ordinary rule of damage in such case is, as already stated, the difference between the contract-price and the market-price at the time and place of delivery When the buyer can go into market and buy the article which the seller has failed to deliver, this is the only rule, as it offers the buyer full indemnity. Special damages are allowed when this rule will not furnish full indemnity. If there is no market for the article where it is to be delivered, and it cannot be had there with reasonable diligence, and the buyer suffers damages because of the seller's failure to deliver, which is the proximate and natural consequence of such failure, such damage can be recovered. There is another pertinent rule of damages, that the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not, by inattention, want of care or inexcusable negligence, permit his damage to grow and then charge it all to the other party. The law gives him

all the redress he should have by indemnifying him for the damage which he necessarily sustains. Now, this paper was to have been delivered on the second day of June to be used for printing a frontispiece for the July number of the Aldine. There is no proof that such paper as this contract called for is not usually to be found in the market, or that it could not, in the small quantity required, be delivered in a few days by manufacturers. All defendants did was to go to dealers in paper a day or two after the second day of June and try to buy paper like that which plaintiffs were to deliver, and they could find none. It does not appear that they made any further efforts. It does not appear that they could not find paper which would answer substantially the purpose. No reason is given why they did not try more than once to find the paper. They heard plaintiffs were getting ready to deliver the paper, and on the seventh day of June they gave plaintiffs notice that they countermanded their order for the paper. Plaintiffs had the paper ready for delivery on the eighth day of June, and so notified the defendants. Hence there is no proof that the defendants could not have had the paper at least as early as the eighth day of June, and there is no proof that it would not have been just as useful for them on that day as at an earlier day. There is no proof what damage they suffered by the delay from the second to the eighth day of June. Under such circumstances the defendants could not refuse to take the paper offered and throw upon the plaintiffs all the remote subsequent damage which they claimed to have sustained. They had the right to refuse to take this paper after the second day of June. But they could not refuse to take it and then claim special damages because they could not get it.

The plaintiffs gave evidence of an interview of one of their clerks with one of the defendants as to the account sued on, in which interview the clerk testified, among other things, that the defendants promised to pay the account. Afterward the defendant was sworn, and he testified, on his direct-examination, denying that he promised to pay the account, and denying many other facts testified to by plaintiffs' clerk. On

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his cross-examination he testified that he had not stated on his direct-examination all the interviews between him and plaintiffs' clerk. He was then asked, on his re-examination by his own counsel, "to tell the jury what that interview was?" The question was excluded. Having gone over the interview on his direct-examination, and somewhat on his cross-examination, whether he should be permitted again to go over the whole interview, was in the discretion of the judge. He was not asked to state any fact which he had omitted, but to give the whole interview. There was no error in excluding the question.

The exclusion of the offer of defendants to show the short weights of paper which had been delivered was not error, as they had no reference whatever to the account in controversy, and as bearing upon the first counter-claim, were wholly immaterial. As to that counter-claim, the judge charged the jury that if they found that the defendants paid the eighty dollars under the fraud and misrepresentation alleged by them, the amount should be deducted from plaintiffs' claim.

I have thus, as fully as I deem it important, considered the principal errors to which our attention has been called. I have carefully examined all the exceptions taken by defendants at the trial, and believing that none of them are well founded, the judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

WILLIAM LEITCH, Respondent, *v.* THE ATLANTIC MUTUAL INSURANCE COMPANY, Appellant.

In policies of marine insurance upon cargo, a condition is implied that the goods insured will be stowed in the usual and customary place for the carriage of goods of that description, and any breach of this implied warranty by which the risk is varied and the perils insured against increased, vitiates the policy.

In actions upon marine insurance the testimony of underwriters as experts is admissible upon the question of materiality of circumstances affect-

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ing the risk, and where evidence of this kind is necessary for the reason that the fact is not sufficiently obvious to enable the court to decide it without such aid, the testimony is to be treated the same as that in reference to any other fact, and if there is no conflict the fact of materiality or immateriality must be held as the witnesses testify.

In an action upon a policy of marine insurance covering a quantity of gold coin it appeared that the coin was not stowed in or under the captain's cabin, the usual places for stowing freight of that description, but in the "run," under the cargo and ballast. This was without the knowledge of defendant. The evidence was undisputed that it was thus exposed to a different risk and the peril in case of disaster at sea greatly increased. The vessel sprang a leak at sea and was abandoned. Underwriters, called as experts, all testified that the unusual method of stowage was a fact material to the risk. *Held*, that the court erred in submitting the question of materiality to the jury; that the risk was not that insured against, and the policy never attached.

(Argued April 17, 1876; decided April 28, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was upon two policies of marine insurance, one for cargo, mahogany and fustic, the other upon specie specified as "Mexican doubloons," alleged to have been taken on board the brig Paquet de Tampico on a voyage from Laguna *via* Minatitlan to New York.

The specie, as plaintiff's evidence tended to show, was taken on board secretly at Laguna and was placed in the "run" of the vessel under the ballast. The vessel sailed from Laguna to Minatitlan. There the outward cargo was discharged, the gold recounted, placed back under the ballast, and the vessel loaded with mahogany and fustic. The vessel sailed from Minatitlan, encountered a gale, sprang a leak, filled with water, and was abandoned. A number of master mariners, called by defendant, testified that the stowage of specie in the manner stated was unusual and improper; that the usual places of stowage were in or under the captain's cabin. Upon this point the evidence was undisputed. Several underwriters, called as experts by defendant, testified that the stowage

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in the manner stated did increase the risk, and the fact was material to be known by the underwriter, and would affect his judgment in accepting the risk, and also the rate of premium.

As to the count of complaint upon the policy covering the gold coin, defendant's counsel moved to dismiss the complaint upon the grounds, among others, that the goods pretended to have been shipped on board the said vessel were, upon the evidence, not shipped in the usual, proper and lawful manner, nor "laden on board," within the meaning of the policies, at the alleged ports of shipment, and that this fact was known to the plaintiff and concealed from the defendant. That the lading of said vessel, upon the evidence, was fraudulent, illegal and improper, and that this fact was concealed from the defendant. That, upon the evidence, facts material to the risk were concealed from the defendant, whereby the policies are avoided. That, upon the evidence, the stowage of specie (if any was shipped) was in an unusual manner and place, whereby the risk (if any such gold was shipped) was different from that assumed by the defendant in the policy described in the first count, and therefore said policy never attached. That the stowage of the specie (if any was shipped) was shown by the evidence to have been in an unusual manner and place, whereby the risk was materially increased, and these facts were concealed from the defendant, and therefore the policy never attached.

The court denied the motion, and said counsel duly excepted.

Defendant's counsel requested the court to charge among other things as follows: "That the jury are bound to find upon the evidence that stowage under the ballast and cargo is a fact material to the risk. That if the jury find that the loss of the gold (if any was shipped) was occasioned by its being stowed under the ballast and cargo, and that it could have been saved if it had been in an accessible place, then they will find for defendant on first count. That if the jury find that there was any specie on board, if they also find that the same was stowed and carried in an unusual place on the vessel, that

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they will find a verdict for the defendant on the first count. That the jury are bound to find that the risks to which it was exposed (if shipped at all) in this unusual place were different in kind or degree from those to which it would have been exposed if stowed in the usual place for the stowage of specie."

The court refused so to charge and defendant's counsel duly excepted.

Further facts appear in the opinion.

Samuel Hand for the appellant. The mere fact of unusual stowage by the insured of goods insured in a marine policy avoids the policy if not known and assented to by the insurer. (*Mer. Ins. Co.* v. *Algeo*, 32 Penn., 330; *Blackett* v. *Assurance Co.*, 2 C. & J., 250; *Atkinson* v. *Gt. W. Co.*, 4 Daly, 27; *Da Costa* v. *Edmunds*, 4 Campb., 142; *Copper Co.* v. *Mer. Ins. Co*, 22 Pick., 108; *The Delaware*, 14 Wal., 602; Marshall on Ins., 3 Dal., 467, 491; 10 B. & C., 527.) Testimony of underwriters, as experts, upon the question of materiality of circumstances to the risk, is admissible where the materiality is not so obvious that the court is bound so to declare it without evidence. (3 Kent Com. [12th ed.], 285, note *e*; *Richards* v. *Murdock*, 10 B. & C., 527; Duer on Ins., 683, note; 1 Pet., 188; *Hartman* v. *Keystone Ins. Co.*, 21 Penn., 478; *Hobby* v. *Dana*, 17 Barb., 111; *Appleby* v. *Ins. Co.*, 54 N. Y., 253.)

W. J. A. Fuller and *E. L. Fancher* for the respondent. The question whether the gold was stowed in a proper place was a question of fact. (*Chase* v. *Eagle Ins. Co.*, 5 Pick., 53; Sherman's Dig. Mar. Ins., 83; *Ocean Ins. Co.* v. *Francis*, 2 Wend., 64.) Defendant was bound to take notice of the condition of affairs in Mexico, and is assumed in law to have made its contract with reference thereto. (*Carter* v. *Boehm*, 3 Burr., 1905; 1 W. Black., 593; *Boyd* v. *Dubois*, 3 Campb., 133; *Neilson* v. *La. Ins. Co.*, 5 Mart. [La., N. S.], 289; 1 Phil. on Ins. [5th ed.], 79, 304, 306–308, 316–337; *Bell* v.

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Bell, 2 Campb., 479; *Md. and Ph. Ins. Co.* v. *Bathurst*, 5 G. & J. [Md.], 159; *Boone* v. *Shaw*, 1 Cai., 489; *Cal. Ins. Co.* v. *Cattell*, 12 Wheat., 383; *Noble* v. *Kenoway*, 1 Dougl., 501; *Kohne* v. *Ins. Co. of N. Am.*, 1 Wash., 93; *Marshall* v. *Un. Ins. Co.*, 2 id., 357; *Buck* v. *Ches. Ins. Co.*, 1 Pet., 151; *Kingston* v. *Knibbs*, 1 Campb., 508, *n*; *Vallance* v. *Dewar*, id., 503; *Da Costa* v. *Edmunds*, 4 id., 142; *Mobile Mar. Ins. Co.* v. *McMillan*, 27 Ala. [N. S.], 77; *Planchi* v. *Fletcher*, 1 Dougl., 251; *Delouguemere* v. *N. Y. F. Ins. Co.*, 10 J. R., 120; *Pelly* v. *Royal Ex. Ass. Co.*, 1 Burr., 341, 350; *Blackette* v. *Royal Ex. Ass. Co.*, 2 C. & J., 249; Arnould Mar. Ins. [5th ed.], 236, 264; 3 Dougl., 419; 4 T. R., 206; 1 Park., 105; 3 Burr., 1707.) The materiality of a representation or concealment is a question for the jury. (*Littledale* v *Dixon*, 4 B. & P., 151; *Rawlins* v. *Desborough*, 2 M. & R., 328; *Westbury* v. *Aberdeen*, 2 M. & W., 267; *McDowell* v. *Fraser*, 4 Dougl., 260; *Shirley* v. *Wilkinson*, 1 id., 306 *n*; *Willis* v. *Glover*, 4 B. & P., 14; *Mackintosh* v. *Marshall*, 11 M. & W., 116, 121; Duer on Mar. Ins. [1844], 78, 196, note 22; *Bridges* v. *Hunter*, 1 M. & S., 15; *Elton* v. *Larkins*, 8 Bing., 198; Arn. on Mar. Ins., 1074; *Livingston* v. *Delafield*, 1 J. R., 522; *Walden* v. *N. Y. F. Ins. Co.*, 12 id., 128, 513; *Tyler* v. *Ætna Ins. Co.*, 12 Wend, 507; *Houghton* v. *Mfg. Mut. Ins. Co.*, 8 Metc., 114; *Col. Ins. Co.* v. *Lawrence*, 10 Pet., 507; *Lindsey* v. *Un. Ins. Co.*, 3 R. I., 157; *Wash. Ins. Co.* v. *Mer. Ins. Co.*, 5 Ohio St., 450; *Percival* v. *Me. Ins. Co.*, 33 Me., 242; *Hacgeniu* v. *Rayley*, 6 Taunt., 186; *Sexton* v. *Mont. Ins. Co.*, 9 Barb., 191; *Masters* v. *Mad. Co. Ins. Co.*, 11 id., 624; 2 Phil. on Ins., 570; 6 Cranch, 338.) Whether a witness offered as an expert has the necessary qualifications is to be decided by the court at the trial. (*Jones* v. *Tucker*, 41 N. H., 546; Arn. Mar. Ins. [1872], 540; 3 Kent's Com., 284, note; *McLanahan* v. *Un. Ins. Co.*, 1 Pet., 188; 2 Duer, 786; 2 Duer on Ins., 783–786.) The fact of a concealment or misrepresentation and the materiality of a fact as to representation and concealment is for the jury. (*Sexton* v. *Mont. Ins. Co.*, 9 Barb., 194; *Masters* v.

Mad. Co. Ins. Co., 11 id., 624; 1 J. R., 523; 3 id., 49; *Cumb. Val. Co.* v. *Mitchell*, 48 Penn. St., 374; *Frank. Ins. Co.* v. *Coates*, 14 Md., 285; 2 M. & R., 329; *Flinn* v. *Headlam*, 9 B. & C., 693; 2 Phil. on Ins., 570; 1 B. & P. N. R., 151; 2 M. & R., 32; *Westbury* v. *Aberdeen*, 2 M. & W., 267.)

ALLEN, J. The question of most prominence, as it is the most important, is as to the validity of the policy upon the gold and the rulings of the learned judge at the trial in respect to it. There is no conflict of evidence or substantial dispute, as to the facts upon which its validity is challenged by the defendant. The claim is that the specie was not stored on board the vessel in the usual and customary place, for the carriage of freight of that description, but that it was placed in an unusual part of the vessel, by which the peril was greatly increased and the risk essentially varied from that assumed by the underwriter. The evidence of the shipmasters given upon the trial was uniform that the usual place for the carriage of coin or specie of any kind was either in some proper place in the cabin or in that part of the run of the vessel immediately under the cabin and accessible from it by an opening in the floor with a trap properly fitted, so that it might be at all times under the immediate watch and care of the captain and only accessible from the cabin. The masters of vessels who were examined as witnesses upon this subject had been engaged in trade to Mexican and South American ports as well as to other ports and places, and all agreed that the usual and proper place for the safe-keeping of coin carried as freight was either in or under the cabin as stated. It was proved by one or more of the witnesses, and not disputed, that the only exception to this usage is when specie is taken out of the country clandestinely in violation of the revenue laws and to evade the payment of export duties, when it is sometimes concealed among the cargo or in other parts of the vessel, but never under the cargo. In such cases, as soon as the vessel is at sea and the pilot has left the ship, the coin is invariably taken from its temporary place of concealment

and deposited in the usual place. The same witnesses, and the only witnesses upon the subject who were experienced as navigators and masters of vessels, agreed that a deposit of coin under the ballast or under the cargo was unusual, and increased the hazards and risk of loss to which it was exposed. In case of disaster it was less accessible and could not be saved in whole or in part as it might under ordinary circumstances and as usually stored. This fact is so palpable upon a mere statement of the different modes and places of stowage that it needed not to be proved by experts. It was not denied that while under the freight, especially such as that laden on board the vessel in this instance, it was safer from barratry or theft than when stowed in the usual place; but even in such case the risk of theft was greater when the vessel was unladen, and during that process, from its liability to be taken by stevedores and others who would have access to it. The claim of the plaintiff is, that the gold was lost not from the perils said to be diminished by the stowage resorted to but by that which was confessedly increased. The gold in the present instance was suffered to remain under the ballast from the time it was placed there at Laguna until the vessel sailed and during the voyage from that port to Minatitlan and until the cargo of mahogany was laden on board at the latter port. During all that time it is self-evident that it was exposed to equal if not greater peril from barratry and theft than if stowed in the usual place. There is no evidence except that of the plaintiff that the gold was seen on board the vessel after it was first laden at Laguna. Whether there was any necessity for the stowage of the gold in the hold of the vessel outside of the cabin, while the vessel remained upon the coast and at the ports of Laguna and Minatitlan which would justify a deviation from the usual course of lading and of which the underwriters might be presumed or were bound to have known and thereby to have assumed the varied risk, cannot be determined upon the present record. These questions were not tried or decided by the trial court. The facts proved by these witnesses, and

which are not controverted by any witness upon the trial, clearly and conclusively establish that the actual risk upon the gold was not the same as it would have been, stowed in the usual place, and that the risk of loss in case of disaster at sea, the peril by which it is claimed the gold was lost, was increased.

In addition to this evidence several underwriters were called, as experts, and they were unanimous in the opinion that the carriage of specie under the ballast and cargo did increase the risk, and that the fact that it was so carried was material to be known by an underwriter, and would affect his judgment in accepting the risk; and, if accepted, the rate of premium. But a single underwriter was called by the plaintiff, and his evidence did not detract from the force of, or conflict with, that given in behalf of the defendant. He testified that a stowage under the cargo would (in his own language), "of course," in some respects increase the risk, so far as the perils of the sea were concerned, and only diminish it as against barratry or theft on the part of the mariners. He also stated that when so stowed, the risk would be different in character and different in kind from what it would be if the gold were stowed in the cabin or in the run immediately under the cabin.

The plaintiff, himself a witness upon the trial, stated that he had frequently shipped specie and carried it under the cargo and the timbers, in oat sacks, in the cook's coppers, and almost everywhere in the vessel where he deemed it most prudent, but he did not state under what circumstances he had so carried it, or that it was usual so to do, or that when so carried it was insured. Under objection that he had not shown himself competent to testify as an expert, he was permitted to testify that, in his opinion, the risk would not be any greater for the safety of the specie, whether stowed under the cargo or in any other place on the vessel, and that it would be safer under the cargo against barratry and theft. His testimony was not in conflict with, but rather in corroboration of, the testimony of other witnesses, except in the statement that the gold was

equally safe in any part of the vessel. It is well settled that the testimony of experts, and especially of underwriters, as such, is admissible upon the question of materiality of circumstances affecting the risk. (*McLanahan* v. *The Universal Ins. Co.*, 1 Peters, 170; 3 Kent's Com., 284.) When evidence of this character is necessary, for the reason that the fact is not sufficiently obvious to enable the court to decide it without aid, the testimony is to be treated as testimony of credible witnesses upon any other fact, and if there is no conflict, the fact of materiality or immateriality must be held as all the witnesses testify. If there is a difference of opinion it then becomes a question of fact for the jury. In every contract of marine insurance there are certain implied stipulations and conditions which are of the same obligatory force as if expressed in the policy, and make a part of the contract, and are distinguishable from mere representations. (Arnould on Ins. [4th ed.], 589.)

One of the conditions implied by law in case of an insurance upon cargo, is that it shall be stowed in a safe and proper manner, and in the usual and customary place for the carriage of goods of the description insured; and any breach of this warranty by which the risk is varied and the perils insured against increased, vitiates the policy. A policy upon merchandise is vitiated by a breach of the implied warranty that the conveying ship is seaworthy, although the shipper of the goods is innocent and has no interest in the ship. (Arnould on Ins., 591.) The insurers, assuming risks which the insured is unwilling to bear, can only be held to those risks for which they have voluntarily and knowingly undertaken, and the insured has no right to substitute any others in the place of those assumed. (2 Pars. on Ins., 2; *Hartley* v. *Buggin*, 3 Doug., 39; *Maryland Ins. Co.* v. *Le Roy*, 7 Cranch, 26.) In *Blackett* v. *The Royal Exchange Assurance Company* (2 C. & J., 244) Lord LYNDHURST, C. B., says: "On an insurance upon goods the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part;" and adds:

"If he were to be made answerable for extraordinary peril he would be answerable for a peril he had not contemplated and for which he had not received an adequate compensation." To this principle may be traced the rule which excludes deck cargoes from the protection of an ordinary policy of insurance (1 Parsons on Marine Ins., 529.) In *Brooks* v. *The Oriental Insurance Company* (7 Pick., 259) the underwriter was held not to be liable upon a valued policy upon a ship, for a hawser lost overboard, which was stowed in the boat on deck instead of in the hold, with the cables, on the passage, the court saying that it was a matter of common information that it should have been stowed in the hold. Here we have the uncontradicted evidence of an established usage as to the proper place for the stowage of gold, and the patent and obvious fact that the usual place is the safer place for carrying it. It is only where there is doubt as to the materiality of a representation or of any deviation or change of risk that it falls exclusively within the province of a jury.

A nonsuit was sustained, by the court *in banc*, in the *Taunton Copper Company* v. *The Merchants' Insurance Company* (22 Pick., 108), upon the ground that the merchandise, which was copper in pigs, had been stowed upon deck instead of being put under deck; and this notwithstanding a general usage for forty years to carry goods, not liable to be injured by dampness, on deck, was proved. The court were of the opinion that the usage stopped *in limine*, and that the insured should have proved in addition that it was usual for underwriters to pay for goods lost when carried on deck. The plaintiff's claim and proof in this case is equally defective. There is no pretence that any underwriter has ever paid for coin lost when stowed in this way and insured by a policy in the ordinary form. The question in *Rickards* v. *Murdock* (10 B. & C., 527) was as to the materiality of a direction, from the insured to the broker, to wait thirty days after the receipt of the letter giving the directions before effecting the insurance. It was held that evidence of the underwriter's opinion was properly received, and that

even without it the jury would have been bound to find that that part of the letter not communicated to the underwriters was material, and that consequently the policy was void. *Da Costa* v. *Edmunds* (4 Camp., 142) was an action upon a policy of insurance on forty carboys of vitriol, and the plaintiff had a verdict upon proof of usage to carry vitriol on the deck, of which usage the underwriters were bound to take notice. Lord ELLENBOROUGH instructed the jury that the underwriters were not liable if the goods were carried on deck without such usage, or if they were not stowed there in a skillful and proper manner. The only questions left to the jury were as to the usage, and whether, if the usage was established, the carboys were properly stowed. The question of materiality was not submitted. (See also *Merchant's Ins. Co.* v. *Alger*, 32 Penn. St., 330; Marshall on Ins., 348, 349; *Milward* v. *Hibbert*, 3 A. & E. [N. S., Q. B.], 120; *The Delaware*, 14 Wall, 579.) The Commission of Appeals, in *Appleby* v. *The Astor Fire Insurance Company* (54 N. Y., 253), reversed a judgment in an action upon a policy of fire insurance for error of the judge, at Circuit, in refusing to direct a verdict for defendant upon the ground that the risk had been materially varied and increased by the introduction to the building of the business of finishing chairs, which had been manufactured in the rough elsewhere. The court held that it was not a case to be sent to a jury, but that the defendant was clearly entitled to a verdict and judgment. Upon a reconsideration of the case, upon a motion for a reargument, the court say: "As an ordinary rule it may be safely assumed that, upon an undisputed state of facts, the court in which an action is pending may render the judgment which the law requires, without the aid or advice of a jury, and that such action by the court does not violate any of the maxims of the law."

The fact being undisputed that the gold for which this action is brought was not stowed in the usual place, but in another part of the vessel, where it was exposed to a different risk (and to increased hazard, save only against barratry and theft), from that to which it would have been exposed had it

been stowed where the defendant had a right to assume it would be stowed, it follows, as a very plain proposition, that the stowage under the ballast and cargo was a fact material to the risk, and the judge should have so charged the jury as requested. The judge should also have charged, as he was requested to do, almost in the very language and according to the evidence of the only underwriter examined as an expert in behalf of the plaintiff, that the risks to which the gold was exposed in this unusual place were different in kind or degree from those to which it would have been exposed if stowed in the usual place for the stowage of specie. If these questions depend upon the testimony of witnesses, the evidence was conclusive, and a verdict in disregard of it should have been set aside; and the defendant was therefore entitled to a direction for a verdict in accordance with it. If the questions were for the court and jury, irrespective of the testimony of experts as to the materiality of the change of place for the stowage, then, as a matter of law, the defendant was entitled to a verdict upon this policy, upon the evidence and upon the direction of the judge and the finding of the jury, that the stowage of specie under the ballast and cargo was stowage in an unusual manner and place, and that the fact of such stowage was concealed from the defendant. There was no room or place for holding, either by the court or jury, that such unusual stowage was a fact not material to the risk. Its materiality is too obvious to be submitted to a jury, and it was error to permit a verdict to pass for the plaintiff upon the ground of the immateriality of this fact, under the circumstances of this case. The risk was not the risk assumed by the defendant, and the policy never attached. It is sufficient that the risk resulting in loss was not the same as that assumed by the defendant. The underwriter had the right to elect whether he would assume the actual risk, and to fix the premium, but it was also an increased risk. If the facts can be varied upon a retrial, the plaintiff may, upon some ground other than that already considered, recover; but upon the

exceptions taken at the trial, defendant, upon this branch of the case, is entitled to a reversal of the judgment.

These views render it unnecessary to consider many of the exceptions taken by the defendant upon the trial, some of which present questions of interest, but as they mostly relate to the shipment of gold they become unimportant if the gold was not covered by the policy. Among the questions thus eliminated from the case, as presented, is the alleged illicit character of the voyage and its effect upon the contract. Many of the questions of evidence are also unimportant, by reason of the effect given by us to the undisputed evidence and the clear change in the risk by the irregular stowage of the gold. Whether the policies were procured by false representations in respect to the character, credit, position and history of the plaintiff, was properly submitted to the jury. The evidence that the policies were issued in reliance upon such representations was not so clear and conclusive as to authorize a withdrawal of the question from the jury. The testimony of the vice-president of the defendant is explicit that he should have declined the risk upon the gold had he supposed that it was to be stowed under the ballast or the cargo; but when he comes to speak upon the effect and influence of the representations in respect to the plaintiff he is not as explicit, but he says he should have depended a good deal upon the standing of the house offering the risks, and leaves it somewhat in doubt as to the extent his action was influenced, in taking the risks, by the statements made to him in respect to the personal character and standing of the plaintiff. Again, there was evidence touching the actual character, history and standing of the plaintiff and the truth of the statements made to the defendant, which made it eminently proper that the whole question upon this branch of the defence should be submitted to the jury.

Several exceptions were taken to the exclusion and admission of evidence upon minor points, which, as they may not be repeated upon another trial, we do not deem it important to consider. Exceptions were also taken to several of the

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refusals of requests, by the defendant, to charge the jury, none of which we deem it important to refer to.

For the errors suggested, and without considering the other questions, which will not necessarily arise upon another trial, the judgment must be reversed, and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

BENJAMIN F. VOORHIS et al.; Appellants, *v.* CYRUS OLMSTEAD et al., Respondents.

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Plaintiffs contracted to sell to B. & Co. a quantity of cotton, in store, to be paid for on delivery. The N. Y. W. & S. Co. loaned to B. & Co. a sum of money, receiving as security an invoice and written pledge of the cotton, and an order upon the warehouseman. Upon presentation of the order, and while the cotton was being weighed and examined for delivery, the warehouseman, with the consent of plaintiffs, gave to the N. Y. W. & S. Co. the ordinary warehouse receipt for the cotton. This was on Saturday. B. & Co. did not pay for the cotton, and on the next Tuesday failed. In an action to recover possession of the cotton, *held*, that, upon the occasion of the loan to B. & Co., the N. Y. W. & S. Co. acquired no title to the cotton, as against plaintiffs, as it parted with its money solely upon the engagement of that firm, and upon their order; that no title was acquired at the time of the delivery of the warehouse receipt, as no value was parted with upon the faith of it; but that, upon receiving the receipt, said company had a right to repose upon it as a ratification of the prior pledge, and having relied upon it, and thereby having been induced to refrain from any attempt to recover the loan or secure an indemnity, plaintiffs were estopped from claiming title.

It is not necessary in such case for the pledgee of property to show that a demand of the money loaned would necessarily have resulted in its recovery; it is enough to show that his position was altered by relying on the evidence of title, and a consequent abstaining from action.

(Argued April 19, 1876; decided April 25, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of

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the defendants, Olmstead and the New York Warehouse and Security Company, entered upon an order denying motion for a new trial, and directing judgment on a verdict. (Reported below, 3 Hun, 744; 6 T. & C., 172.)

This was an action of replevin to recover possession of 226 bales of cotton.

On the 2d May, 1868, plaintiffs sold the cotton then in store with defendant, Cyrus Olmstead, a warehouseman in New York, to George E. Biddle & Co., cotton dealers of that city, to be received and paid for within ten days. On the seventh of May, said firm made a written call on the plaintiffs for delivery of the cotton. The weighing and inspecting the cotton for delivery began on Friday, the eighth; on that day Biddle & Co. applied to defendants The New York Warehouse and Security Company for a loan upon this and other cotton. The said company loaned him $44,000, receiving as security an invoice and written pledge of the cotton, and an order on Olmstead therefor. The order was presented the same day; Olmstead stated that the cotton was being turned over, and directed the person presenting the order to come the next day, when the receipt would be given. Plaintiffs, upon being advised of the presentation of the order, directed the warehouseman to give a receipt. Accordingly, on Saturday, Olmstead issued and delivered to the company an ordinary negotiable warehouse receipt for the cotton, acknowledging receipt thereof on storage for account of George E. Biddle & Co. The same night, after business hours, plaintiffs having received the weigher's return for the cotton, made out a bill, with weigher's return attached, and sent it to Biddle & Co.'s office. On Monday, the eleventh, plaintiff sent for a check in payment for the cotton, but did not succeed in getting it, and on Tuesday, the twelfth, Biddle & Co. stopped payment. On Wednesday they first notified defendant, the warehouse and security company, of their claim. Biddle & Co., on receiving the check for the loan of $44,000, deposited it to their account in the National City Bank. At the close of bank hours on Friday, there remained

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to their credit in that bank $52,377.85; and at the close of business on Saturday, $31,878.96. At the time Biddle & Co. stopped payment, this balance had all been drawn out, and no assets could be discovered.

The court, on motion of defendants' counsel, directed a verdict for defendants, Olmstead and The New York Warehouse and Security Company, to which plaintiffs' counsel duly excepted. A verdict was rendered accordingly. Exceptions were ordered to be heard at first instance at General Term.

Wm. A. Beach for the appellants. Defendants acquired no color of title under what is known as the factor's act. (6 Edms. Stat., 668; 4 id., 461; *Jenni* v. *McNamee*, 45 N. Y., 614.) The sale being for cash, payable on delivery, no title would pass until the delivery was completed in every point and the purchase-money paid, or its payment waived and credit given. (*Kein* v. *Tupper*, 52 N. Y., 550; *Ballard* v. *Burgett*, 40 id., 314; *Hutchings* v. *Monger*, 41 id., 155; *McNeil* v. *Tenth Nat. Bank*, 46 id., 325; *Coghill* v. *H. and N. H. R. R. Co.*, 2 Gray, 545; *Leighton* v. *Stevens*, 1 App., 154; *Churchill* v. *Bailey*, 1 Shif., 64; *Comstock* v. *Smith*, 10 Shep., 202; *Luby* v. *Bundy*, 9 N. H., 298; *Maxwell* v. *Briggs*, 17 Vt., 176; *Bradley* v. *Arnold*, 16 id., 382; *Fairbank* v. *Phelps*, 22 Pick., 535; *Dresser M. Co.* v. *Waterston*, 3 Met., 9; *Lehigh* v. *Field*, 8 W. & L., 232; *McBride* v. *White Lead*, Geo. [Dals.], part 1, 165; *Bennett* v. *Sims*, 1 Rice, 421; *Bradshaw* v. *Thomas*, 7 Jerg., 477; *Reeves* v. *Harris*, 1 Bailey, 563; *Marston* v. *Baldwin*, 17 Mass., 606; *George* v. *Stubbs*, 26 Me., 243; *Herring* v. *Willard*, 2 Sandf., 418; *Buckmaster* v. *Smith*, 22 Vt., 409; *Etty* v. *Aldrich*, 46 N. H., 127; *Armington* v. *Houston*, 38 W., 448; 36 Mo., 479; *Patton* v. *McCane*, 15 B. Mon., 555; *Acker* v. *Campbell*, id., 372; *Pond* v. *Bradley*, 9 G. & J., 220; *Blanchard* v. *Child*, 7 Gray, 155; *Penbank* v. *Crooker*, id., 158; *Goodwin* v. *May*, 23 Geo., 205; *Dichon* v. *Bigelow*, 8 Gray, 159; *Gragin* v. *Coe*, 29 Conn.; 51; *Plumer* v. *Stinly*, 16 Ind. 480.)

Opinion of the Court, per ALLEN, J.

Joseph H. Choate for the respondents. Plaintiffs are estopped from retaking the cotton by the warehouse receipt to the order of Biddle. (*Contl. Bank* v. *Bank of Comm.*, 50 N. Y., 577; *Knights* v. *Wiffen*, L. R., 5 Q. B., 660; *Casco Bank* v. *Keene*, 53 Me., 103; *Irving Bank* v. *Wetherald*, 36 N. Y., 335; *Del. Bank* v. *Jarvis*, 20 id., 226; *St. John* v. *Roberts*, 31 id., 442; *M. and Tr. Bank* v. *Hazard*, 30 id., 226; *Finnegan* v. *Carraher*, 47 id., 493; *Dezell* v. *Odell*, 3 Hill, 218.) The advance made by defendants on the cotton constituted them *bona fide* purchasers, and they had the paramount right when this action was commenced. (*Cartright* v. *Wilmerding*, 24 N. Y., 538; Benj. on Sales [2d Eng. ed.], 342; *Mowrey* v. *Welch*, 13 Wend., 570; *Caldwell* v. *Bartlett*, 3 Duer, 341; *Keyser* v. *Harbeck*, 3 id., 373, 391; *Derbrow* v. *Macdonald*, 5 Bosw., 130; 39 N. Y., 233; *Wilmot* v. *Richardson*, 7 Bosw., 590; *White* v *Garden*, 10 C. B., 519; *Kingsford* v. *Merry*, 11 Exch., 537; *W. Tr. Co.* v. *Marshall*, 37 Barb., 509.) There was no evidence of any *mala fides* on the part of defendants that would have warranted a verdict for plaintiffs on that ground. (*Welch* v. *Sage*, 47 N. Y., 143; *Belmont* v. *Hoge*, 35 id., 67; *Birdsall* v. *Russell*, 29 id., 249; *Murray* v. *Lardner*, 2 Wal., 121.)

ALLEN, J. The New York Warehouse and Security Company acquired no title to the cotton as against the plaintiffs upon the occasion of the loan to Biddle & Company. The company did not part with its money upon the apparent ownership of the property by Biddle & Company, but relied solely upon the engagement of the latter firm, and their order upon the warehousemen for the ordinary warehouse receipt. At the time of the delivery of the warehouse receipt to the company no money was advanced or value parted with upon the faith of such receipt, and therefore no title was then acquired to the cotton and the company as pledgees can only hold the cotton on the ground that the plaintiffs are estopped from claiming title to it by some act on which the company has relied and been induced to vary its position. The plain-

tiffs voluntarily consented that the warehouseman should give the usual storage and warehouse receipt to Biddle & Company as owners, and thus invested them with the possession of the property and the usual documentary evidence of title, so that they are estopped, as against those dealing with Biddle & Company, upon the faith of such apparent ownership, from reclaiming the property or asserting title to it. So far as innocent third persons are concerned, who have been influenced in their actions by the apparent ownership of Biddle & Company, the plaintiffs must be deemed to have waived the payment of the purchase-price of the cotton, as a condition precedent to the actual vesting of the title. The rule prevails in such a case, that where one of two innocent persons must suffer by the fraud or wrongful act of another, the loss shall fall upon him by whose act or neglect the fraud or wrongful act has become possible. The plaintiffs gave credit to Biddle & Company and enabled them to deal with the cotton as their own, by investing them with the possession and the *indicia* of ownership. The security company risked their money upon the faith of the promise of Biddle & Company to procure and deliver the warehouse receipt for the property; but upon the receipt of that they had a right to repose upon it as evidence of Biddle & Company's title and a ratification of the prior pledge of the cotton for the loan; and the plaintiffs, having consented to the issuance of the receipt by the warehouse, must be held to have assented to the transfer or other use of it by Biddle & Company and that faith should be given to it as to like instruments. Had the company not obtained the warehouse receipt, they might have resorted to some process for the recovery of their loan or other indemnity against loss. The receipt was delivered on Saturday, and probably in the morning; but whether earlier or later in the day is not material, as Biddle & Company did not fail in business until Tuesday, giving ample time to the company to take measures to protect itself. The case cannot be distinguished from *Knights* v. *Wiffin* (L. R., 5 Q. B.,

660). There M., having purchased a quantity of barley from the defendant without having paid for the same, sold it to the plaintiff and received the pay therefor, giving an order for the delivery to the plaintiff. Upon being shown the delivery order, the defendant said it was all right, and that when a note for forwarding was received he would ship the barley. M. became bankrupt and the defendant, as unpaid vendor, refused to deliver the barley. The court held him estopped by his statement from denying that the goods had passed to the plaintiff; for the reason that by making such statement he induced the plaintiff to rest satisfied under the belief that the property had passed and so to alter his position by abstaining from demanding back the money which he had paid to M. Here, as in that case, the position of the security company was altered through the plaintiff's conduct. The plaintiffs knew, when they assented to the delivery of the warehouse receipt, that it would be regarded as evidence of title in Biddle & Company and that any party to whom it was transferred would, according to the well known usage of the trade, rest satisfied. The company did rest satisfied in the belief that the property had by the negotiation of the receipt been passed to it. BLACKBURN, J., in the case cited uses this language: "If the plaintiff had been met by a refusal on the part of the defendant he could have gone to Moris and have demanded back his money. Very likely he might not have derived much benefit if he had done so, but he had a right to do it." It was not necessary in the present instance for the pledgee of the property to show that a demand of the money loaned would certainly have resulted in its recovery. It is enough that its position was altered by relying on the evidence of title furnished to Biddle & Company by the plaintiffs and abstaining from action. The same principles were applied in *The Continental National Bank* v. *The National Bank of the Commonwealth* (50 N. Y., 575); and *Knights* v. *Wiffin* is cited with approval. *Barnard* v. *Campbell* is entirely consistent with both cases, and also cites *Knights* v. *Wiffin* as authority (55 N. Y., 456). There

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was no evidence to show any want of good faith on the part of the security company, in the transaction or any connection between the loan of this money to Biddle & Company and the payment of other loans by the latter to it, or that any part of the money loaned upon this cotton was repaid to the company.

The case was well disposed of in the court below. Judgment must be affirmed.

All concur.

Judgment affirmed.

THE INTERNATIONAL LIFE INSURANCE AND TRUST COMPANY, Respondent, *v.* THE FRANKLIN FIRE INSURANCE AND TRUST COMPANY, Appellant.

A policy of fire insurance contained a clause declaring, in substance, that in case the assured cause the property to be described other than it really is, so that it be charged at a lower premium, or if the risk be increased by means within his control, without notice and consent, the policy will be void; also, that if the risk be increased by the erection of buildings, "or by the use of neighboring premises or otherwise," or if for any other cause the company shall so elect, it shall be optional with it, after notice to the assured or his representative, to terminate the insurance; in that case refunding a ratable proportion of the premium. In an action upon the policy, defendant's evidence tended to show that before the loss it notified the insured and plaintiff, who, as mortgagee, was, by the policy, entitled to receive the insurance in case of loss, that it elected to and did cancel the policy; defendant also tendered back the unearned premium. *Held*, that it was entirely optional with defendant when, and for what reason, to terminate the insurance, and the motive or the sufficiency of the cause could not be inquired into; and that, therefore, a refusal of the court so to charge, and a refusal to submit the question of cancellation to the jury, was error.

(Argued April 21, 1876; decided April 28, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York,

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affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought upon two policies of fire insurance upon buildings and machinery, issued by defendant to one James Wilson, owner; loss, if any, payable to plaintiff, as mortgagee.

Attached to, and made part of each policy, were certain "conditions of insurance," and among them the following:

"1. Persons desirous of making insurances are to furnish the company with the following information: The construction, material, occupancy and location of the buildings, as well as of those contiguous, and a description of the articles to be insured. If the assured shall cause the buildings, goods or other property to be described in this policy otherwise than as they really are, so that they be charged at a lower premium than is herein proposed, this policy shall be of no force; or if the risk shall be increased by any means whatever, within the control of the assured, during the continuance of the insurance, and notice thereof be not given to the company, and such increased risk be allowed and indorsed thereon, this policy shall be of no force; or if, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise; or if, for any other cause, the company shall so elect, it shall be optional with the company to terminate the insurance, after notice given to the assured, or his representative, of their intention to do so, in which case, the company will refund a ratable proportion of the premium."

Defendant gave evidence, on the trial, tending to show that, prior to the loss, it notified Wilson and plaintiff that it elected to cancel, and that it did cancel the policy; also, that it tendered the unearned premiums on both policies.

Defendant's counsel moved to dismiss the complaint on the ground that the policies had been terminated before the loss, which motion was denied. Said counsel then moved for leave to go to the jury upon the question of cancellation, which was also denied.

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Said counsel asked the court to charge, among other things: "That, by the terms and conditions of the policies, the defendant had the right to terminate the policies before a loss occurred, by giving notice of its intention to do so to the party insured by the policies, or his representative, and refunding to such insured party, or his representative, a ratable proportion of the premiums prescribed in the policies," which request was refused; and the court, upon motion of plaintiff's counsel, directed a verdict for plaintiff. To all of which rulings said defendant's counsel duly excepted. A verdict was rendered in accordance with the direction.

Joseph A. Welch for the appellant. The insurance was terminated by the notice given and tender of rebate of premium to the assured by defendant's general agent. (*Van Valkenburgh* v. *Lenox F. Ins. Co.*, 51 N. Y., 465; *Hathorn* v. *Ger. Ins. Co.*, 55 Barb., 28; *Williams* v. *People's F. Ins. Co.*, 57 N. Y., 274; *Allen* v. *Massasoit Ins. Co.*, 99 Mass., 160.) Defendant was entitled to go to the jury on the question concerning the actual cancellation of the policies through Place, as agent of the assured. (*Grosvenor* v. *At. F. Ins. Co.*, 17 N Y., 391; *Bidwell* v. *N. W. Ins. Co.*, 19 id., 179; *Springfield F. and M. Ins. Co.* v. *Allen*, 43 id., 389; *Cone* v. *Ma. F. Ins. Co.*, 60 id., 619; *Graves* v. *Hampden F. Ins. Co.*, 10 Al., 281; *Macomber* v. *Camb. F. Ins. Co.*, 8 Cush., 133; *King* v. *State Mut. F. Ins Co.*, 10 id., 337; *Jackson* v. *F. Ins. Co.*, 5 Gray, 52; *Hale* v. *Mech. Mut. F. Ins. Co.*, 6 id., 169; *Loring* v. *Mfrs. Ins. Co.*, 8 id., 28; *Bowditch* v. *M. F. Ins. Co.*, id., 38; *Young* v. *Eagle F. Ins. Co.*, 14 id., 150; *Turner* v. *Quincy Ins. Co.*, 109 Mass., 573; *State Mut. F. Ins. Co.* v. *Roberts*, 81 Penn., 438; 1 Lans., 29; 3 Met., 66; 1 Seld., 469; 3 Dutch., 134; 3 Hall, 675; 30 Md., 91; 3 E. & B., 868.)

A. J. Vanderpoel for the respondent. For defendant to avail itself of the reserved option to terminate the contract, the cause must be of the nature of those specifically enumerated in the condition. (*Reynolds* v. *Com. F. Ins. Co.*,

47 N. Y., 597; *Corning* v. *McCullough*, 1 id., 69; *Coffin* v. *Reynolds*, 37 id., 640; *Aiken* v. *Wasson*, 24 id., 484; Potter's Dwar. on Stat., 292; *Watchone* v. *Langford*, 3 Camp., 422.) "Other person or persons" limits to persons of the same description as those enumerated. (*Branwell* v. *Pinneck*, 7 B. & C., 534; *Hardy* v. *Ryle*, 9 id., 611; *Landiman* v. *Breach*, 7 id., 96; *Kitchen* v. *Shaw*, 6 A. & E., 729; *Chegary* v. *Jenkins*, 3 Sandf., 413.) The cause must be one arising after the issuing of the policy. (*Williams* v. *People's F. Ins. Co.*, 57 N. Y., 281.) Place was not, in respect to the policies, an agent of plaintiff. (*Van Valkenburgh* v. *Lenox F. Ins. Co.*, 51 N. Y., 465.)

ALLEN, J. Upon the evidence the jury would have been authorized to find that, before the destruction of the insured buildings by fire, the defendant had notified, as well Wilson, the insured and the owner, as the plaintiff, the mortgagee, and as such, under the policy, entitled to receive the money thereon in case of loss; that it elected to, and did, cancel the policy, and offered to refund and tendered to each "a ratable proportion of the premium." The conditions attached to the policy provide that the same shall be void and of no force in case either the property has been misdescribed by the insured, so as to diminish the premium, or the risk shall be increased during its continuance, by any means whatever, within the control of the assured. In such case the company is not required to refund any part of the premium. Other clauses of the same condition provide for a termination of the insurance, at the election of the insurers, upon notice to the insured and a repayment of a ratable proportion of the premium. The insurers may so elect, if during the insurance the risk be increased by the erection or occupation of buildings upon neighboring premises "or otherwise;" and it is also provided that "if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance" after the like notice and upon repayment of unearned premium.

The claim of the plaintiff is, that there must be some cause for terminating the insurance, under the last clause of the policy of the same character as, and similar to, those described in the other clause of the condition, and involving an increase of risk. One difficulty for this interpretation is that provision had been previously and fully made for terminating the insurance, upon an increase of the risk by any means upon the insured or adjoining premises, or by means within the control of the assured, or by the acts and agency of others — that is, by any means or by any agency. The words "any other cause," in the last clause of the condition, are not to be interpreted upon the principle of *noscitur a sociis*, as words of a like character are sometimes interpreted, to limit and restrict their operation and give effect to the intent of the legislature in the construction of statutes, or of contracting parties in giving effect to their agreements. This particular paragraph or clause is perfect by itself, and is not made a part of the clauses or conditions preceding it, and is not a continuation of such clauses. The words "or otherwise," immediately preceding the paragraph under consideration, clearly include every increase of risk which would authorize the termination of the insurance for that cause. The clause upon which the defendant relies, and under which it acted, is very broad and permits the company to elect to terminate the insurance for any cause which it shall deem sufficient or by which it may be prompted to act. It makes it entirely optional with the company when and for what reason it shall terminate the contract. It may do so from mere caprice, from a desire to close its business in one particular locality, to discontinue a particular class of risks or to terminate a particular risk. The exercise of this option is not made to depend, expressly or by implication, upon any change in the risk, or upon a knowledge of any fact acquired after the making of the insurance, or upon any change in the circumstances or condition of the insured or the insurers or of the premises. The motive, or the sufficiency of the cause for the exercise of this option and election are not to be passed upon by any tribunal, but the will of the

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company and its election must stand for the reason of its action, and is cause for terminating the risk. No question can be made upon this record as to the force and effect or the sufficiency of the acts of the defendant to terminate the policy, provided it had the right to do so in the exercise of its option. The plaintiff claimed, and the court in the construction of the contract held, that the right of election could not be exercised upon the mere motion and volition of the company, which we think was erroneous. We are not authorized to vary the terms of the contract and limit the right of election on the part of the insurers beyond its terms.

We are not favored with the reasons of the learned court below for the judgment given, but as we view the contract the judgment must be reversed and a new trial granted.

All concur.

Judgment reversed.

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FRANKLIN H. PERSON, Appellant, *v.* WILLIAM A. M. GRIER, Impleaded, etc., Respondent.

A resident of a foreign State, while attending a court of this State as a witness, cannot be served with a process for the commencement of a civil action against him.

As to whether a distinction in respect to their immunity exists as to suitors and witnesses from a foreign State, and those residing in this State, *quære*.

(Argued April 25, 1876; decided April 28, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term setting aside a service of the summons upon defendant Grier. (Reported below, 6 Hun, 477.)

Said defendant was the only one served. He is a resident of Pennsylvania, and was served while in attendance at a Circuit in Chemung county as a witness in an action in the Supreme Court wherein the plaintiff herein was a defendant

Opinion of the Court, per ALLEN, J.

J. McGuire for the appellant. Defendants were not exempted, by any statute, from the service of civil process unaccompanied by an arrest while attending court as a witness, or in going to or returning from such court. (*Pollard's Case*, 7 Abb. [N. S.], 71.)

Nathaniel C. Moak for the respondents. The service of the summons, while defendant was attending as a witness from another State, was irregular. (*Merrill* v. *George*, 23 How. Pr., 331; *Sanford* v. *Chase*, 3 Cow., 381; *Norris* v. *Beach*, 2 J. R., 294; *Brown* v. *Tuckerman*, 7 id., 588; *Seaver* v. *Robinson*, 3 Duer, 622; *Sanford* v. *Chase*, 3 Cow., 381; *Pollard* v. *Union, etc.*, 7 Abb. Pr. [N. S.], 70; *Janeau Bank* v. *McSpedan*, 5 Bis., 64; *U. S.* v. *Edme*, 9 S. & R., 149; *Stuart's Case*, 1 Dal., 356; *Halsey* v. *Stewart*, 4 N. J. [1 South.], 366; *Parker* v. *Hotchkiss*, 1 Wal., Jr., 269; *Gilbert* v. *Vanderpool*, 15 J. R., 242; *Miles* v. *McCullock*, 1 Bin., 77; *Hayes* v. *Shields*, 2 Yates [Penn.], 222; *Bolton* v. *Martin*, 1 Dal., 296; *Huddeson* v. *Prizer*, 9 Phila., 65; *Clark* v. *Grant*, 2 Wend., 257; *Sanford* v. *Chase*, 3 Cow., 381; *Holmes* v. *Morgan*, 1 Phila., 217; *Hurst's Case*, 4 Dal., 387; *Doty* v. *Strong*, 1 Pin. [Wis.], 84; *Anderson* v. *Rountree*, id., 115; *Dixon* v. *Ely*, 4 Edw. Ch., 557; *Walpole* v. *Alexander*, 3 Doug., 45.)

ALLEN, J. It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo*. This rule is especially applicable in all its force to suitors and witnesses from foreign States, attending upon the courts of this State. In some instances witnesses and suitors, residents of the State, have only been discharged from arrest upon filing common bail; but the service of process upon non-resident witnesses and suitors has been absolutely set aside, thus giving color to a distinction between the two classes in respect

to their immunity. Whether any distiction should or does in fact exist, is at least doubtful. This immunity is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process. Witnesses might be deterred, and parties prevented from attending, and delays might ensue or injustice be done. In *Norris* v. *Beach* (2 J. R., 294) the defendant, a resident of the State of Connecticut, attending in this State to prove a will, was held exempt from the service of a *capias* and discharged absolutely from the arrest. The like relief was granted in *Sanford* v. *Chase* (3 Cow., 381), and the defendant, a resident of Massachusetts, arrested upon civil process while attending as a witness before arbitrators, was discharged absolutely without filing common bail, the court saying: "The privilege of a witness should be absolute." The court in *Hopkins* v. *Coburn* (1 Wend., 292), expressly affirm the absolute immunity of foreign witnesses attending our courts from the service of civil process for the commencement of an action. The same rule was held in *Seaver* v. *Robinson* (3 Duer., 622) and *Merrill* v. *George* (23 How., 331) and the service of a summons upon persons attending from other States as witnesses in this State was in each case set aside. This court, in *Van Lieuw* v. *Johnson* (decided in March, 1871, but not reported), substantially adjudged that a summons could not be served upon a defendant, a non-resident of the State, while attending a court in this State, as a party. Four of the judges taking part in that decision were of the opinion that neither a party nor a witness attending a court in this State from a foreign State could be served with summons for the commencement of an action. The order denying an application to set aside the summons in that case was affirmed upon the ground that the party had lost his privilege by remaining within the State an unreasonable and unnecessary time after the close of the trial upon which he had attended. CHURCH, Ch. J., and FOLGER, J., dissented from this result, being of the opinion that the privilege had not been lost. The authorities, as well as the principle upon which the privi-

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lege rests, clearly lead to an affirmance of the order. The defendant Grier attended in this State, in good faith, as a witness, and the summons was served upon him while he was so attending and during the continuance of the freedom from arrest. The courts will not take jurisdiction of a party whose rights are thus invaded. It would be, in effect, and for all practical purposes, a withdrawal of the shield and protection which the law uniformly gives to witnesses, if a party coming from a foreign State could be served with process and an action commenced against him, the judgment in which would conclude him in all jurisdictions and could be enforced by action everywhere.

The order must be affirmed.

All concur.

Order affirmed.

JOSEPH SPEARS et al., Respondents, *v.* JOSEPH MATHEWS, Impleaded, etc., Appellant.

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The court has no power, after judgment against plaintiff in an action, and pending an appeal by him therefrom, to grant an injunction or to revive or continue a temporary injunction previously granted.

(Argued April 25, 1876; decided April 28, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department affirming an order of Special Term granting an injunction herein, and reviving and continuing a preliminary injunction obtained by plaintiffs.

The action had been tried upon the merits, and judgment perfected in favor of defendant, and the motion was made pending an appeal from the judgment.

Thomas Allison for the appellant. The court has no power after judgment, and pending an appeal therefrom, to grant an injunction in the same action, or to revive a preliminary

injunction previously granted. (*Erie R. Co.* v. *Ramsey*, 45 N. Y., 637–645; *Fellows* v. *Heermans*, 13 Abb. Pr. [N. S.], 1.)

E. N Taft for the respondents. The court has power to revive and continue the injunction during the pendency of the appeal from the judgment dismissing the complaint. (*Disbro* v. *Disbro*, 37 How. Pr., 147; *Hoyt* v. *Carter*, 7 id., 141, 142; *Hart* v. *Mayor, etc.*, 3 Paige, 381; 2 Wait's Pr. 120.)

Per Curiam. The precise question involved in this appeal was decided adversely to the respondents by this court in *Fellows* v. *Heermans* (reported in 13 Abb. Pr. [N. S.], 1), where it was held that the court had no power to revive or continue a temporary injunction obtained by the plaintiff, after judgment against him in the action pending his appeal from the judgment.

The decision was made by a divided court, but a majority of the judges agreed to the judgment pronounced in that case, and the question here presented was considered and distinctly passed upon. The court were of the opinion that the Code defined and limited the power of the court in respect to granting injunctions, and that the right to an injunction in any case, if it existed, was to be found in the provisions of the Code. This decision was referred to in *Erie Railway Company* v. *Ramsey* (45 N. Y., 637) as establishing this proposition. The question is, therefore, *res adjudicata*, and we do not deem it useful to restate the grounds upon which this court based its decision. It may be that the power of the court to continue an injunction pending an appeal from an order or judgment dissolving it ought to exist, but this is a question for the legislature.

The order should be reversed.

All concur.

Order reversed.

Statement of case.

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PETER O. WILLIAMS et al., Executors, etc., Respondents, v. THE TOWN OF DUANESBURGH, Appellant.

As to whether the prior decisions in this State, holding that the legislature had power, under the Constitution, to authorize municipal corporations to subscribe for and hold stock in railroad corporations, and to issue their bonds in payment therefor were, in effect, overruled by the case of *People* v. *Bachellor* (53 N. Y., 128), *quære* (ANDREWS, FOLGER and RAPALLO, JJ., holding that they were not; CHURCH, Ch. J., and ALLEN, J. holding that they were, and that the power did not exist; MILLER, J. not voting).

Where, however, in pursuance of legislative enactment, municipal bonds have been issued and transferred to purchasers for value, prior to the decision in *People* v. *Bachellor*, they are protected by the earlier decisions, and as far as their validity depends upon the constitutional power of the legislature, will be sustained.

Although the legislature cannot compel a municipal corporation to subscribe for railroad stock and to issue its bonds in payment therefor, yet, where, under a mandatory act, the municipality has voluntarily and without the compulsion of judicial process subscribed for and taken the stock and issued its bonds, the latter are not invalidated by the compulsory character of the act; it operates as an authority and permission to do the acts, and, having been done, they will be considered as having been done voluntarily (ANDREWS, J.; FOLGER and RAPALLO, JJ., concurring).

In an action upon bonds issued in 1862 by defendant's railroad commissioner to pay for subscriptions to stock of the A. and S. R. R. Co., *held*, that although the bonds were issued without a compliance with the conditions precedent prescribed in the acts authorizing such subscription (chap. 64, Laws of 1856, and acts amendatory thereof), yet that the same were validated by the provision of the act of 1864 (chap. 402, Laws 1864), declaring that when the road of said company shall have been constructed through a town its bonds shall be valid, although such conditions were not complied with (ANDREWS, RAPALLO and FOLGER, JJ., concur, on the ground that the legislature had power thus to vitalize the bonds; CHURCH, Ch. J. and ALLEN, J., while doubting the power, concur, on the ground that, as to the defendant's bonds, the court was concluded by the decision of the Commission of Appeals in *Town of Duanesburgh* v. *Jenkins* [57 N. Y., 177]).

(Argued May 25, 1875; decided May 23, 1876.)

APPEAL from a judgment of the General Term of the Supreme Court, in the third judicial department, affirming a

judgment in favor of plaintiffs, entered upon a decision of the court on trial without a jury. The nature of the action and the facts are set forth sufficiently in the opinion of ANDREWS, J.

A. P. Parker for the appellant. The acts of 1863 and 1864, so far as they declared the bonds valid, in spite of the non-consent of the town, are unconstitutional and void. (*People* v. *Batchellor*, 53 N. Y., 128; 2 Redf. on Railways, 434; *Town of Queensbury* v. *Culver*, 19 Wal., 91; *People* v. *Mitchell*, 35 N. Y., 551; *Young* v. *Beardsley*, 11 Paige, 93; *Beekman* v. *Sav. Co.*, 3 id., 45; *Taylor* v. *Porter*, 4 Hill, 140; *Loan Assn.* v. *Topeka*, 20 Wal., 663.)

Nathaniel C. Moak for the respondents. A *bona fide* holder of the bonds in suit could recover against defendant, although the statutory requirements to their issue had not been complied with. (*Thompson* v. *Lee County*, 3 Wal., 327; *Mercer Co.* v. *Hackett*, 1 id., 83; *Lee Co.* v. *Rodgers*, 7 id., 181; *Supvrs.* v. *Schenck*, 5 id., 772; *Township of Pine Grove* v. *Talcott*, 19 id., 666; *Rice* v. *R. R. Co.*, 1 Black., 386; *Milner* v. *City of Pensacola*, 2 Am. L. T. R., 186; *Bk. of Rome* v. *Village of Rome*, 19 N. Y., 25; *Town of Queensbury* v. *Culver*, 19 Wal., 92; *Comrs. of Knox Co.* v. *Aspinwall*, 21 How. [U. S.], 544; *Gelpecke* v. *City of Dubuque*, 1 Wal., 203; *Meyer* v. *City of Muscatine*, id., 384; *Pendleton Co.* v. *Amy*, 13 id., 304; *Nugent* v. *Supvrs.*, 19 id., 241; *City of Lexington* v. *Butler*, 14 id., 282; *Grand Chute Co.* v. *Winegar*, 15 id., 371; *St. Joseph Township* v. *Rogers*, 16 id., 645.) The acts of 1863 and 1864 repealed the condition of the original act requiring the consent of a portion of the tax-payers, and made the affidavits filed conclusive evidence, and rendered the subscription and the bonds legal and valid. (*People* v. *Mitchell*, 35 N. Y., 552; *Ft. Plain Bridge Co.* v. *Smith*, 30 id., 44; *People* v. *Clarke*, 53 Barb., 178; *Portsmouth, etc.* v. *Town of Yellowhead*, 3 Bis., 474; *James* v. *Patten*, 6 N. Y., 9; *Oakley* v. *Aspinwall*, 13 id., 500; *N.*

Y. T. C. v. *Schuyler*, 8 Abb., 239; *City of Kenosha* v. *Lamson*, 9 Wal., 478; *Thompson* v. *Lee Co.*, 3 id., 327; *In re Protestant, etc.*, 46 N. Y., 178; *In re Meyer*, 50 id., 504; *Hand* v. *Ballou*, 12 id. 543; *Hickox* v. *Tallman*, 38 Barb., 608; *Forbes* v. *Halsey*, 26 N. Y., 63; *Mass* v. *Mercer*, 15 Barb., 318; *Stocking* v. *Hunt*, 3 Den., 274.)

ANDREWS, J. This action is brought to recover interest due on certain bonds, issued and delivered in May, 1862, by one Jenkins, railroad commissioner of the town of Duanesburgh, to the Albany and Susquehanna Railroad Company. The bonds are part of $30,000 of bonds issued by him as commissioner in payment of a subscription of that amount made by the commissioner in the name of the town to the capital stock of the company. They contain a recital that they are issued by virtue of an act of the legislature of the State of New York, entitled "An act to authorize any town in the counties of Schenectady, Schoharie, Otsego, Delaware, Chenango and Broome to subscribe to the capital stock of the Albany and Susquehanna Railroad Company, passed March 31, 1856, and of the acts amending the same," and the bonds, when delivered, created a valid obligation against the town of Duanesburgh, under the enabling acts referred to, provided those acts were a lawful exercise of legislative power, and the commissioner in issuing the bonds, acted within the authority conferred thereby.

The validity of enabling acts, authorizing town and other municipal corporations to subscribe for stock, and to issue bonds in aid of railroad enterprises in the locality, was first considered by this court in *The Bank of Rome* v. *The Village of Rome* (18 N. Y., 38), and the constitutionality of such legislation was distinctly affirmed. The question had before that been raised in the Supreme Court, and had been decided both adversely to, and in favor of, the validity of such legislation. In *Town of Duanesburgh* v. *Jenkins* (57 N. Y., 177), JOHNSON, commissioner, gave an instructive history of the course of judicial decision in the State upon the subject. The

doctrine of the case of *The Bank of Rome* v. *The Village of Rome* has not only not been impaired by subsequent decisions, but it has been expressly reaffirmed. (*Starin* v. *Genoa*, 23 N. Y., 439; *Gould* v. *Sterling*, 23 id., 456; see *Clark* v. *The City of Rochester*, 28 id., 605.) And in the late case of *The People* v. *Smith* (45 N. Y., 781), which was a *certiorari* to review the proceedings on the application to bond the town of Phelps, in aid of the construction of a railroad, ALLEN, J., who delivered a very able opinion, while in the Supreme Court, in *Clark* v. *The City of Rochester* (13 How., 204), against the validity of municipal bonding acts in aid of railroads, concedes that that view has not received the sanction of the courts.

Cases involving the regularity of proceedings under these enabling acts, have repeatedly been before this court, and while it has uniformly held to a strict construction, and has refused to uphold proceedings under them, unless an exact compliance with the requirements of the statute was shown, it has never assumed to rejudge the question of the constitutional validity of the legislation, upon which the proceedings were founded, although in every case the invalidity of the law would have been a complete and final answer to the claim of authority to issue the bonds. (*People* v. *Smith*, 45 N. Y., 772; *Same* v. *Hurlbert*, 46 id., 110; *Same* v. *Knowles*, 47 id., 415; *Same* v. *Sawyer*, 52 id., 296; *Same* v. *Spencer*., 55 id., 1; *Same* v. *Smith*, 55 id., 135; *Same* v. *Morgan*, 55 id., 587.)

The decision in *The Bank of Rome* v. *The Village of Rome* was made in 1858, under one of the earliest acts on the subject of municipal bonding in aid of railroad enterprises. After that decision, numerous projects for the construction of railroads in different parts of the State were conceived, which could only be carried out by means of corporate aid extended by the cities and towns through which they were to be constructed. Many of these projected lines of road were of doubtful utility, and many others were in localities where neither population or business warranted the expectation of a profitable traffic. But it was easy in the abnormal condition

of the country during the civil war to induce individuals or communities to engage in hazardous enterprises, and to pledge their means or credit to support them. Legislation to enable cities and towns to pledge their credit in aid of railroads was readily procured and municipal bonding for railroads became a recognized part of the system of railroad construction. These bonds were put upon the market, and were purchased upon the faith of the decision in *The Bank of Rome* v. *The Village of Rome*. The legislature authorized savings banks to invest the savings of their depositors in them, and they were sought for investment, not by capitalists only, but by trustees and persons of limited means, who desired to invest in available securities promising a fixed and certain income. Under these circumstances, the court cannot at this time, without doing the greatest injustice, overrule *The Bank of Rome* v. *The Village of Rome*. The doctrine of *stare decisis* has here a most forcible application. The rule declared in that case has become in the nature of a rule of property. It is doubtless true, that in many cases severe taxation without compensating benefits will be entailed to pay the indebtedness created under the bonding acts. But the loss must fall either upon the community at large, or upon those who have purchased bonds, the issue of which the legislature sanctioned, and the validity of which this court deliberately affirmed. We adhere to the decision made in *The Bank of Rome* v. *The Village of Rome*. The question involved in that case is not now open to controversy in this court.

It is claimed that, conceding the power of the legislature to pass enabling statutes authorizing towns to subscribe for stock or to issue bonds in aid of the construction of railroads the act under which the bonds in question were issued was invalid, for the reason that it did not simply authorize, but *required* the commissioner, when the consent of the tax-payers had been obtained and the proofs filed, to subscribe for the stock of the railroad corporation, and to issue the bonds of the town in payment therefor. The acts relating to town subscriptions in aid of the Albany and Susquehanna

Railroad Company, passed prior to May, 1862 (when the bonds in question were issued) were chapter 64 of the Laws of 1856, chapter 401 of the Laws of 1857, and chapter 384 of the Laws of 1859. Under all the acts, the obtaining of the consent of a proportion of the tax-payers, and the filing of proofs of consent in the town clerk's office, were made conditions precedent to the right of town commissioners to issue the bonds of the town. The act of 1856, as amended in 1857, provided, in substance, that the commissioner, on the consent being obtained and the proof filed, may borrow, on the faith and credit of the town, the sum mentioned in the consents, not exceeding $100,000, and execute bonds therefor. (§ 2.) The third section authorizes the commissioner to dispose of the bonds at not less than par, and invest the proceeds in the stock of the road, and directs that the money shall be used in the construction of the road; and authorizes the commissioner to subscribe for and purchase the stock of the company to the amount for which the tax-payers have consented, not exceeding the sum limited. The act of 1859 provided for a different disposition of the bonds from that contemplated in the act of 1857, and makes such disposition imperative upon the commissioner. The second section is as follows: "Any town now authorized to subscribe to the capital stock of said company, whenever the proofs shall have been filed in the clerk's office, of the consent, etc., in pursuance of an act passed March 31, 1856, as amended April 14, 1857, authorizing a subscription, by the commissioner, in the corporate name of the town, to the capital stock of the company, such subscription *shall be made* by the commissioner, or commissioners, for the amount the tax-payers shall consent to, not exceeding $100,000, in the same manner as individual subscribers; and the said commissioners *are hereby authorized and required* to issue the bonds authorized by said act in payment, at par, of the stock so subscribed, in installments, as required in case of individual subscribers."

In *People* v. *Bachellor* (53 N. Y., 128) this court held that a *mandamus* would not lie to compel a town to issue its

bonds and subscribe for stock in a railroad corporation under a mandatory act of the legislature. In that case the town had not acted; the bonds had not been issued, and no subscription had been made. GROVER, J., in his opinion, considered that an act requiring a town to subscribe for stock in the corporation was equivalent to compelling the town to engage in the business of a common carrier, and thereby subjecting itself to the duties and responsibilities of that relation. He said: "A municipal corporation cannot be compelled to embark in a business of a private character, because its prosecution by it will probably, or certainly, lead to taxation for the capital to be invested, or expenses incurred therein." But I do not understand that case as deciding that the construction of railroads is not a public purpose for which taxation may be justified.

The validity of enabling acts authorizing towns to issue bonds and subscribe for stock in aid of railroads was not questioned. The case of *The Bank of Rome* v. *The Village of Rome* was referred to in the opinion, and distinguished. It was not overruled, and no suggestion was made that it was not well decided. The learned judge in his opinion, after stating the question in the case then under consideration, adds: "This is a different question from that decided by this court in *The Bank of Rome* v. *The Village of Rome*, and in subsequent cases." If, in this case, the bonds of the town of Duanesburgh had not been issued, and no subscription had been made to the stock of the Albany and Susquehanna railroad, and the proceeding was to compel the town to issue its bonds and subscribe for stock, the case of *The People* v. *Bachellor* might have some application. But here the town, by its agent, has issued its bonds and subscribed for and taken the stock of the road. This was done after the passage of the act of 1859, but the town commissioner did not act under the compulsion of judicial process, but voluntarily, under the authority of the act. If the performance by the town, or its agent, of the acts directed to be done, could not be enforced, the statute, nevertheless, operated as an authority

and permission to do the acts contemplated, and, having been done, they must be considered as having been done voluntarily under this permission and authority. The taking of stock in exchange for the bonds of municipal corporations is a mere incident to the primary purpose of enabling acts of this character, and authority to subscribe for stock to the amount of the bonds issued, or to invest the proceeds of the bonds in the stock of the railroad company which the municipality is authorized to aid, may be lawfully conferred. In *The Bank of Rome* v. *The Village of Rome* authority was given to the village by the act in question in that case to subscribe for the stock of the railroad mentioned in the act, and to provide for paying therefor by the issue of corporation bonds. This decision covers the question as to the power of the legislature, in both aspects. For these reasons, I am of opinion that the objection to a recovery, founded upon the mandatory character of the act of 1859, cannot be sustained.

It is claimed that the affidavits filed prior to the issuing of the bonds were defective, and did not show that the requisite number of tax-payers had consented. Proofs were filed in the proper clerk's office, in attempted compliance with the law, which show that consents were obtained, in some form, of a large number of tax-payers to the issue of the bonds; but the affidavits are confused and uncertain, and, while it does not appear that the requisite consents were not obtained, it must, we think, be conceded that the affidavits fail to show affirmatively this fact. It is the doctrine of this court, established in the cases arising under statutes for bonding towns in aid of railroads, that when the right to issue the bonds of the town is made by the statute to depend upon the consent of tax-payers, or other conditions precedent, and the bonds are issued without the conditions having been performed, they are void in whosesoever hands they may be. But the legislature may overlook a defective execution of the power conferred, and, by retroactive legislation, cure defects in the action of municipalities under these statutes. The legislature may, in the first instance, prescribe the conditions upon which

the bonds may be issued. It may designate the agencies through which the municipality shall act, and determine what measure of consent of tax-payers shall be required, and in what form it shall be expressed. It may by subsequent legislation, when there has been a failure to perform conditions precedent, and the bonds have been issued, dispense with such conditions, and ratify and confirm, and make valid and obligatory upon the municipality, bonds issued without such performance — at least, it may do so in cases where the municipality has, through the construction of the road, or by the receipt of the stock of the company in exchange for the bonds, received the benefit which the statute contemplated as the equivalent for the liability it was authorized to incur. The officers authorized under these statutes to issue the bonds, are public agents and the legislature, looking over the whole matter, may, when in its judgment justice requires it, ratify and confirm their acts, which otherwise would be valid. In this case the legislature could originally have authorized the bonds of the town of Duanesburgh to be issued under the precise circumstances existing when they were issued, and if the acts of the commissioner have, by subsequent legislation, been ratified, it is equivalent to an original authority to do what has been done. The authorities as to the legislative power to validate, by subsequent legislation, acts done in assumed execution of a statute authority which has not been strictly followed, are numerous and decisive. (*People* v. *Mitchell*, 35 N. Y., 551; *Town of Duanesburgh* v. *Jenkins*, *supra*; *Gelpcke* v. *Dubuque*, 1 *Wal.*, 203; *Thompson* v. *Lee County*, 3 id., 377; *Beloit* v. *Morgan*, 7 id., 619; *St. Joseph Township* v. *Rogers*, 16 id., 663; *Shaw* v. *Norfolk County Railroad Co.*, 5 Gray, 180; Cooley Const. Lim., pp. 371–379, and cases cited.)

By chapter 402 of the Laws of 1864, it was provided as follows: "And when bonds have been issued by the commissioner or commissioners of any town, and the said [Albany and Susquehanna] railroad shall have been constructed through such towns, the bonds shall be valid and binding on said town, without reference to the form or sufficiency of such affidavits

and the principal and interest on the bonds shall be levied, raised and paid in the manner provided in the original act."

This statute applies to the bonds issued by the defendant and operates as full and complete legislative declaration and recognition of their validity. (*People* v. *Mitchell*, *supra*; *Town of Duanesburgh* v. *Jenkins*, *supra*.)

The judgment should be affirmed.

FOLGER, J. I concur in the result reached by ANDREWS, J.; I do this upon the principle, *stare decisis*. I conceive that the case of *Bank of Rome* v. *Village of Rome* (18 N. Y., 38), and the line of cases following it, have established the law for this State, that the legislature, before the late amendments to the Constitution, had power *to authorize* a municipality to issue its bonds in aid of a railroad corporation, and that thus a rule of property has been set up, which we may not disturb. The case of *The People* v. *Batchellor* (53 N. Y., 128), in the judgment rendered, did not conflict with those cases, as it declared only, that the legislature had not power *to compel* a municipality to do such an act, a distinct question which had not before been passed upon by this court. The opinion of Judge ANDREWS shows that the present case is not affected by *The People* v. *Batchellor*. It also shows that the irregularities of official action in the issuing of the bonds in this case have been remedied by legislative action, which, within the rule laid down by prior decisions in this court, was competent.

ALLEN, J. Before any judicial decision by the courts of the State directly upon the point, I came to the conclusion, and so adjudged in *Clark* v. *City of Rochester* (13 How., 204), for reasons there imperfectly stated, that the legislature had no power under the Constitution to delegate to, or confer upon, municipal corporations the authority to subscribe for and to hold stock in railroad corporations, and to issue their bonds in payment therefor. In the light of experience and the disastrous effects of the exercise of such power, the corruption of public morals and the burthen of taxation now

resting upon municipalities resulting from its exercise, I see no reason to regret the view I then took of such extra municipal powers. Notwithstanding the reversal of that judgment and the almost unbroken current of decisions adverse to it, there has at all times been a strong dissent from the views which have prevailed, and if the question were *res nova* it is possible a different result would be reached by the courts. A strong inclination has been manifested, as well by the courts as the people, to retrace the steps taken and turn back, so far as possible, the current of authority. Whenever the people have been permitted to speak as they have done in this State, in Pennsylvania, Ohio and Illinois, and perhaps in other States, the legislatures have been expressly prohibited from delegating such power to municipal corporations. The express prohibition of the exercise of the power at the first opportunity after it was assumed, is some evidence that in committing to the legislature the power to create municipal corporations for the purposes of local government, it was only intended that such powers should be conferred either for the imposition of taxes for the creation of debt, or for any other purpose as directly pertained, and were essential, to the government of a municipality as one of the constituent parts of the State government. Judge DILLON, in his work on municipal corporations (page 147), well remarks: "The judgments affirming the existence of the power have generally met with strong judicial dissent and with much professional disapproval, and experience has demonstrated that the exercise of it has been productive of bad results."

The question was first presented to this court in *The Bank of Rome* v. *The Village of Rome* (18 N. Y., 38), in which it was held that there was no constitutional restriction, either in terms or by necessary intendment, upon the power of the legislature, and that it might confer upon municipal authorities the power to subscribe to the stock of a railroad corporation, and to raise the necessary funds by taxation or upon its credit. Five, only, of the judges concurred in this result; Judges COMSTOCK, DENIO and PRATT, although not in terms

dissenting, withholding their assent by taking no part in the decision. The same case was again before the court (19 N. Y., 20) upon the effect of the certificate of the commissioners as to the performance of a condition precedent to the issuing of the bonds, and it was held, Judges DENIO and GRAY expressing no opinion, that the certificate was conclusive evidence, in behalf of a *bona fide* holder of the bonds, of the facts therein asserted. *Clark* v. *City of Rochester* (*supra*), when it came before this court (as reported in 28 N. Y., 605) was decided, so far as the question of legislative power was concerned, upon the authority of *The Bank of Rome* v. *The Village of Rome* (*supra*); JOHNSON, J., dissenting; INGRAHAM, J., expressing the opinion that the statute and the contract made in pursuance of it were void, and SELDEN, J., taking no part. Although the doctrine was regarded as settled by *Bank of Rome* v. *Village of Rome*, courts and judges have reluctantly yielded to its authority upon the principle of *stare decisis*, and the number of protestants has always been considerable. In *The People* v. *Batchellor* (53 N. Y., 128), the authorities bearing upon the question of legislative power, and the constitutional right to confer upon municipalities authority, by a loan of their credit, to aid private railroad corporations, were collated and considered. In the judgment pronounced in that case, the court went far toward directly, in terms, overruling the former decisions upon the subject, and made a decided retrograde movement in hostility to the existence of the power claimed. Notwithstanding the apparent and nominal disclaimer of the learned judge, now deceased, by whom the opinion was prepared, and the attempt to distinguish the case from others, the cases which affirm the right of the legislature to confer upon municipal corporations the power referred to were, in effect, overruled. Such is the logical and necessary sequence of the judgment; and there is no ground upon which it and the cases which preceded it can be reconciled or made consistent.

Judge JOHNSON, in his opinion, as one of the Commission of Appeals, in *The Town of Duanesburgh* v. *Jenkins* (57 N.

Y., 177) was entirely right in his assertion, that to admit the competency of the town by its own assent, or the assent of a majority of its tax-payer or electors, with the authority of the legislature to do the acts in question, was fatal to the argument that the legislature could not compel a town to do the same acts. The legislature could not do indirectly, or by conferring authority on subordinate and local governments, that which it could not do directly and by its own act. It could delegate no power which it did not possess itself. The validity of the act in question depends wholly upon the power of the legislature, as the municipality has no inherent power; and, therefore, when this court decided that the legislature could not directly perform the act, or compel the municipality to perform it, it necessarily decided that power could not be conferred upon the municipality by any vote or assent of its members to do the act. I am constrained, therefore, to regard the last decision of this court as authority. It rests upon sound principles, and must be regarded as declaratory of the law. The case of *Weismer* v. *Village of Douglass** recently decided by this court, and not as yet reported, in which it was held that bonds issued by the village of Douglass in aid of a private corporation, and by authority of the legislature, were invalid, is to some extent an authority in accordance with the views already expressed as to the validity of the bonds in suit, so far as their validity depends upon the legislative power.

We are at liberty to carry the decision in *People* v. *Batchellor* to its clear, logical results, and apply to loans of credit by municipal corporations since its promulgation the doctrine necessarily involved in the judgment there given. As there was no inherent power in the town of Duanesburgh, as a municipal corporation, to incur the obligation, and the legislature had no power to compel its assumption by the town officials in behalf of the town, or by its own act to impose such extra municipal obligations upon the corporation or the inhabitants of the town, it follows that but for the previous decisions of this court we should be constrained to hold that the bonds

*64 N. Y., 91.

were void and the issue of them *ultra vires*, and that they could not be validated by a transfer to a purchaser for value. There could be no *bona fide* holder, as all would take with full knowledge of the want of power in the agents to bind the town. But the bonds in suit had been issued and transferred to the present holders for value before the prior adjudications of the court had been judicially impeached or questioned; and the purchasers took them upon the faith of those decisions, relying upon them as declaratory of the law of the State. If the bonds had been issued since the last decision of this court that would have controlled; but having been issued before, there are cogent reasons for holding, if possible, that they are protected by the prior decisions commencing with *Bank of Rome* v. *Village of Rome* (*supra*). The Supreme Court at Washington has held that courts cannot destroy or affect the validity of obligations incurred pursuant to powers decided by the highest courts of the State to have been constitutionally conferred and before such decisions have been overruled by a different interpretation of the Constitution and the constitutional powers of the legislature. (*Thomson* v. *Lee County*, 3 Wall., 327; *Havemeyer* v. *Iowa County*, 3 id., 294.) Whether it is intended by these decisions to deny, as is implied by the language of the opinions of the learned judges, the constitutional power of a State court to impair the obligation of a contract by a decision promulgated after the making of the contract overruling a prior decision of the same court by which the contract would, by the Constitution and law of the State, as before expounded, have been adjudged valid, or merely that under such circumstances the later judgment would not be followed as a rule of decision in respect to contracts made after the first and before the promulgation of the later, is not material to the case in hand. They are precedents which, under the circumstances, may be followed, for holding that the first decision should govern as to obligations incurred before such decision was impeached, and while it was properly regarded as the true exposition of the Constitution and laws of the State. In no other way can those who

have become the holders for value of bonds which have been issued by municipalities and by authority of the legislature in aid of private corporations be saved from loss.

The validity of the bonds, so far as their validity depends upon the power of the legislature, being assented to for the reasons and upon the authorities stated, the only other questions are whether the conditions precedent and upon which the existence of the authority in the local agents to bind the town by the issue of the bonds had been performed, and as to the effect of the enabling and validating act of 1864. (Laws of 1864, chap. 402.) That the conditions were not complied with, and the necessary consents of the taxable inhabitants procured is, I think, very clearly shown, and but for the acts of the legislature, and especially that of 1864 (*supra*), the plaintiffs would have failed in this action by reason of the want of power in the officers to act. (Dillon on Munic. Corp., 413, and cases cited; *Marsh* v. *Fulton Co.*, 10 Wall., 676.)

I should have had great difficulty in giving the effect to the act of 1864 claimed for it so as to make the bonds, given for what is manifestly an extra municipal purpose, valid notwithstanding the want of power in the officials to issue them, if the question was an open one at this time. It is not entirely clear to me that the cases relied upon to establish the legislative authority and the force and efficacy of the act to vitalize the bonds, or the principles upon which they rest, are applicable to or decisive of the question. But, in respect to the issue of the bonds of the present defendant, of which those in suit are a part, this court is concluded by *The Town of Duanesburgh* v. *Jenkins* (*supra*), in which the Commission of Appeals, a court of concurrent jurisdiction and equal authority with this court, has decided the precise question after a deliberate examination; and it would be indecorous, if we were disposed to do so, to review that decision. It must stand not only as the law of the case, but conclusive as to all the bonds of the present defendant issued by the same authority and under the same circumstances.

Without, therefore, considering the question or re-examin

ing the same, or the principles upon which that decision rests, but giving effect to it as an authority binding upon this court, I am willing to affirm the judgment, on the ground that the bonds were valid and obligatory by the act of 1864, notwithstanding the alleged defects in the actual power of the agents to bind the town.

RAPALLO, J., concurs with ANDREWS, J.; FOLGER, J., concurs on grounds stated in memorandum. CHURCH, Ch. J., concurs with ALLEN, J.; MILLER, J., not sitting.

Judgment affirmed.

SAMUEL R. BRICK et al., Appellants, *v.* JULIA E. BRICK et al., Respondents.

A person having capacity sufficient to acquire a large fortune by personal industry and intelligence, who successfully conducts a large business, whose business correspondence shows a clear comprehension of the subjects upon which he writes, and who is pronounced by his intimate friends of sound mind, and of more than ordinary intelligence and firmness, will not be considered as incompetent to make a will simply because he exhibits eccentricities of character in regard to himself, is subject to fits of melancholy in regard to his health, even amounting to hypochondria.

To avoid a will on the ground of undue influence, it must be made to appear that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity, which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse or too weak to resist.

The exercise of undue influence need not be shown by direct proof; it may be inferred from circumstances, but the circumstances must be such as to lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator.

The admission of improper evidence in proceedings before a surrogate for the probate of a will is not ground for reversal of his decision admitting the will to probate, if it appears from the whole case that the will was properly sustained.

Where, in the matter of a probate of a will, the surrogate has acquired jurisdiction of all the parties in interest, he is not divested of this juris-

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diction by the death of one of the parties, and where the survivors appear and litigate, without objection because of an omission to bring in the heirs and representatives of the deceased party, such omission cannot impair the validity of the proceedings as to the survivors.

(Argued December 17, 1875; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a decision of the surrogate of the county of Kings admitting to probate the will of Joseph K. Brick, late of Brooklyn, deceased.

The deceased died August 7, 1867, aged fifty-five years, leaving Julia E. Brick, his widow, three brothers and a sister him surviving. He left a large estate, all of which by the will was given to his widow. The will was contested upon the ground of mental incapacity and of restraint and undue influence. The citation was served upon all the heirs and next of kin. Pending the hearing before the surrogate John E. Brick, one of the brothers of the deceased, died, leaving four children. No proceedings were had to bring them in, and no objection was taken on that account. They appeared in the Supreme Court upon appeal. The facts disclosed upon the hearing are set forth sufficiently in the opinion.

D. R. Jaques, *M. B. Field* and *Henry E. Davies* for the appellants. The fact that a will is unjust is of itself evidence tending to show that it was obtained by fraud or undue influence. (*Fisher* v. *Clarke*, 1 Paige, 176; *Lynch* v. *Clements*, 24 N. J. Eq., 431; Redf. on Wills, 520, 527, 528; *Harvey* v. *Sullens*, 46 Mo., 147, 154; *Davis* v. *Calvert*, 5 G. & J., 300; *Turner* v. *Cheesman*, 2 McC., 265; 1 Jar. on Wills, 36, 39; *Gilbert* v. *Gilbert*, 22 Ala., 529; *Darley* v. *Darley*, 3 Bradf., 481; *Tyler* v. *Gardner*, 35 N. Y., 596; *Marvin* v. *Marvin*, 5 T. & C., 429; 3 Hun, 139; *Gardner* v. *Gardner*, 34 N. Y., 155; *Seguin* v. *Seguin*, 3 Keyes, 663.) Undue influence in regard to a will may be established by showing influence possessed and exerted by the chief beneficiary over the decedent in respect to other subjects. (*Lewis* v. *Mason*, 109 Mass.,

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169; Redf. on Wills, 519, 523; *Mountain* v. *Bennett*, 1 Cox, 355; *Jackson* v. *Jackson*, 32 Ga., 325.) It need not be proved directly, but may be established by circumstances. (*Marvin* v. *Marvin*, 3 Abb. Ct. App. Dec., 192; *Reynolds* v. *Root*, 62 Barb., 254; *Davis* v. *Calvert*, 5 G. & J., 269, 303; *Hall* v. *Hall*, 1 E. L. & Eq. [P. & D.], 482; *Taylor* v. *Williams*, 20 Mo., 306.) It was proper to consider, in determining the question of undue influence, the provisions of the will, the mental and bodily condition of the decedent, his relation to the beneficiary claiming under it, and to those who would naturally be the objects of his bounty, and their conduct, acts and declarations. (Swinb. on Wills, 447; Lovelass on Wills, 139; Redf. on Wills, 515; *Fulke* v. *Adam*, 1 Redf., 454; *Fairchild* v. *Buscomb*, 35 Vt., 398; *Bunbien* v. *Cicott*, 12 Mich., 459; *Pelamoresnes* v. *Clark*, 9 Iowa, 1; *Lucas* v. *Penmas*, 27 Ga., 593; *Lamb* v. *Gritman*, 26 id., 625; *Stedman* v. *Stedman*, 32 Ala., 525; *Dean* v. *Negley*, 41 Penn., 312; *Mountain* v. *Bennett*, 1 Cox, 353; *Harwood* v. *Baker*, 3 Moore's P. C., 282; *S. F. Soc.* v. *Hopper*, 33 N. Y., 619; *Smith* v. *Tibbett*, 1 L. R., 398; *Welsh Will*, 7 N. Y. Leg. Obs., 153; *Waring* v. *Waring*, 6 Moore's P. C., 309; *Lee* v. *Dill*, 11 Abb. Pr., 214; *Delafield* v. *Parish*, 25 N. Y., 9; *Clarke* v. *Fisher*, 1 Paige, 171; *Allen* v. *Pub. Admr.*, 1 Bradf., 378; *Dew* v. *Clark*, 3 Ad., 79; *Landis* v. *Landis*, 1 Grant's Cas. [Penn.], 248; *Reynolds* v. *Root*, 62 Barb., 250; *Kinne* v. *Johnson*, 60 id., 69; *Voorhies* v. *Voorhies*, 39 N. Y., 463; *Barry* v. *Boyle*, 1 T. & C., 422; *Coffin* v. *Coffin*, 23 N Y., 9; *Forman* v. *Smith*, 7 Lans., 449; *Tyler* v. *Gardner*, 35 N. Y., 559; *Campbell* v. *Dubois*, 4 Barb., 393; *Van Pelt* v. *Van Pelt*, 30 id., 134; *Leech* v. *Leech*, 4 Am L. J., 179.)

Samuel Hand and *W. M. Graham* for the respondents. Mere weakness of mind does not incapacitate a testator, nor do perverse opinions or unreasonable prejudices. (*In re Forman's Will*, 54 Barb., 274; *Jackson* v. *Jackson*, 39 N. Y., 153; *Clapp* v. *Fullerton*, 34 id., 190; *Seaman's Soc.* v. *Hop*

per, 33 id., 619; *Delafield* v. *Parish*, 25 id., 97; *Stewart* v. *Lispenard*, 26 Wend., 255; *Blanchard* v. *Nestle*, 3 Den., 37; *Burger* v. *Hill*, 1 Bradf., 360; *Seguine* v. *Seguine* 4 Abb. Ct. App. Dec., 191; *McGuire's Estate*, 1 Tuck., 196; *Gardiner* v. *Gardiner*, 34 N. Y., 155; *Boughton* v. *Knight*, L. R., 3 P. & D., 64; *Sefton* v. *Hapwood*, 1 F. & F., 598; *Grindall* v. *Grindall*, 4 Hagg. Eccl., 1; *Winch* v. *Murray*, 3 Curt. Eccl., 623; *Peck* v. *Cary*, 27 N. Y., 18; *Ross* v. *Christman*, 1 Ired., 209; 1 Redf. on Wills, 52.) Monomania will not affect the will when it is upon subjects entirely unconnected with its provisions. (*Stanton* v. *Weatherwax*, 16 Barb., 259; *Martin* v. *Johnston*, 1 F. & F., 122.) Undue influence, to vitiate a will, must be an influence exercised by coercion, imposition or fraud; it must be such as to deprive the testator of the free exercise of his will. (*Gardiner* v. *Gardiner*, 34 N. Y., 155; *Parfitt* v. *Lawless*, L. R. [2 P. & D.], 462; *Boyse* v. *Ld. Rossborough*, 6 H. L. Cas., 2; *Lovett* v. *Lovett*, 1 F. & F., 581; *Newhouse* v. *Goodwin*, 17 Barb., 236; *Carroll* v. *Norton*, 3 Bradf., 291; *Blanchard* v. *Nestle*, 3 Den., 37; *Dean* v. *Negley*, 41 Penn., 312; *Small* v. *Small*, 4 Greenl., 220; *Jackson* v. *Jackson*, 39 N. Y.. 153; *Marvin* v. *Marvin*, 4 Keyes, 9; *Handley* v. *Stacey*, 1 F. & F., 574.)

RAPALLO, J. The probate of the will in question is contested on the ground of want of testamentary capacity in the testator, and also of undue influence exercised over him by his wife, Mrs. Julia E. Brick.

The will was executed in March 1860. The testator died in 1867, aged about fifty-five years. At the time of the execution of the will and subsequently the testator was in active business. He was engaged in the management of the affairs of the Brooklyn Gas Company, and also in setting up gas retorts at Newport R. I. His voluminous business correspondence during the month of March 1860, and the preceding and subsequent months, exhibits a vigorous intellect, and apparently a very clear comprehension of the subjects upon which he

writes, while the minute instructions which his letters contain show close attention, energy and continuity of purpose. That correspondence, if there were no other evidence in the case, is sufficient to show a degree of mental capacity, far exceeding that which is required to render a person competent to make a will. But, in addition, the proponents called a large number of disinterested witnesses, who were well acquainted with the testator, and many of them in intimate business and social relations with him, who pronounce him a man of sound mind, and more than ordinary intelligence and firmness. Several of the contestants' witnesses concur in this judgment. Even the son of the principal contestant, candidly concedes that he always thought the testator of sound mind, and never saw any thing to the contrary, and thought him a man of firmness and decision of character, and good judgment in business matters, and the physician who attended the testator during his last illness, and who was examined by the contestants, testifies that even at that time, the testator's mind was sound and well balanced, and his judgment and memory good.

The evidence on the part of the contestants tends to show eccentricities of character, especially in regard to medicating himself for real or supposed diseases, and much testimony is devoted to showing that he was in the habit from an early period in his life of taking large quantities of medicine, and was subject to fits of melancholy on the subject of his health, amounting, as claimed, to hypochondria. I cannot but believe that the facts in this respect are greatly exaggerated by the witnesses, but taking their testimony as true, they do not, in connection with the uncontroverted facts in the case, show that want of mental capacity which should avoid a will. These peculiarities existed as claimed by contestants from the testator's boyhood, and it would be indeed strange that a person should have the capacity to acquire a large fortune by his personal industry and intelligence, and from causes existing at the same time be held not to have sufficient mental capacity to dispose of it by will.

Opinion of the Court, per RAPALLO, J.

Many of the occurrences testified to by the contestants' witnesses, and from which they seek to infer a disordered mind, took place long after the making of the will in question, but taking them all into consideration, they fail to overthrow the clear evidence with which the case abounds, of the competency of the testator to transact business. A morbid condition of mind on the subject of his health — great depression, resulting from the loss of his children, and some peculiarities or eccentricities in his domestic life, are disclosed by the testimony on the part of the contestants. But his competency to make a will is, we think, established beyond question.

It is claimed, however, upon the part of the contestants, that Mrs. Julia E. Brick, availing herself of the enfeebled condition of the decedent, by undue influence, procured the execution of the will, in question, in her favor. To avoid a will on this ground, it must be made to appear that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse, or too weak to resist. (1 Jarman on Wills, 36, 39; Redfield on Wills, 520, 530; *Gardiner* v. *Gardiner*, 34 N. Y., 155, 162; *Seguine* v. *Seguine*, 3 Keyes, 663.)

No importunity or direct action, on the part of Mrs. Brick, to induce the making of this will is shown. It is not indispensable that there should be direct proof of the exercise of undue influence. It may be inferred from circumstances; but the circumstances must be such as to lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator. The circumstances immediately attending the execution of this will, so far from indicating that it was the result of any influence exerted upon the testator, tend strongly to show that it was his free and spontaneous act. It was made on the 16th of March, 1869, without the knowledge of Mrs. Brick, who testifies that she did not even know of its existence until after the death of the testator, and was not even acquainted with

the counsel who drew it. It further appears that it was a transcript of a will which the testator had made in 1855, excepting only a change in the name of the executor. This will of 1855 the testator took to the office of his counsel, Ingraham, Underhill & Reynolds, Esqs., and requested Mr. Ingraham to alter it, by substituting Mr. Howe as executor, and it was re-engrossed with that alteration and executed. Mrs. Brick had no part in the transaction, and was ignorant of it. This will of 1855, which made the same disposition of the testator's property, appears equally to have been the free act of the testator. He called at the office of C. P. Smith, Esq., his counsel, and requested him to draw his will, and, after consultation with Mr. Smith, directed him to draw the will, leaving all his property to his wife. He then had an infant child living. No agency or participation of Mrs. Brick in the making of this will appears, and she testifies that she did not know of it until after it was made, and never read it. The codicil of 1866 makes no change in the will of 1860, except that of adding Mr. White as executor, and the circumstances under which it was executed tend very strongly to show that the will of 1860 expressed the true wishes of the testator, and was not the result of any influence or constraint. The testator went alone to the office of the Messrs. Ingraham and stated that all the alteration he desired was the adding of Mr. White, who had become his partner, as executor, and that if it could be done by a codicil the will was just as he wished it. Mr. William M. Ingraham, one of the witnesses to the codicil, on his cross-examination by the contestants, testified that the testator gave as a reason why he would rather have a codicil than execute a new will, that he had brothers and a sister to whom he wished to leave nothing; that he wished to leave all his property to his wife; that it had come to his ears that his competency to make a will would be disputed, but he did not believe any question could be raised about his competency to make a will at the date of that will, and therefore he preferred not to have it altered, and whatever change he made he would make by a codicil and reaffirm that will. The codicil was

drawn accordingly and executed by the testator at the office of the Messrs. Ingraham. It thus appears that from 1855 to 1860 the testator entertained the intention of leaving all his property to his wife. That the death of his children produced no change in this intention, and that it continued down to the year 1866, when the codicil was executed. As before observed, there is no direct evidence of any attempt on the part of Mrs. Brick to influence the testator in respect to his testamentary dispositions, but the contestants seek to establish that she possessed a powerful influence over him, which she employed in unjustly prejudicing his mind against his brothers and sister, and estranging and secluding him from them, and that by these means she diverted to herself the bounty which he would otherwise have bestowed upon them.

A vast amount of testimony was taken upon this point, going into all the details of the history of the family, and the minutest particulars of the domestic life of the testator, and of his intercourse and dealings with his brothers and sister. And from a consideration of all this testimony, the duty devolves upon us of determining whether the court below correctly decided the question of fact.

This involves not only the consideration of the weight to be attached to the circumstances testified to by the witnesses, but also the credibility of their statements, the great bulk of the testimony relied upon by the contestants proceeding from the parties interested in breaking the will. A detailed review of the evidence would be out of place here, and we must content ourselves with some general observations concerning it.

In the first place, it cannot escape our attention that a very large proportion of the testimony has a very remote, if any, bearing upon the question at issue, as it relates to a period long subsequent to the making of the will.

The relatives from whom it is alleged that Mrs. Brick sought to estrange the testator were his sister, Mrs. Winchester, and her children, his niece Mary E. Brick, and his brothers Edward K., John E., and Samuel R. Brick. Suspending for the present any observations concerning Mrs. Winchester, our attention

is first called to the evidence relating to the testator's niece Mary E. Brick. Much stress is laid upon the alleged conduct of Mrs. Julia E. Brick in relation to this niece, resulting, as is testified to by some of the witnesses, in her preventing the testator from indulging the sympathy which he expressed for her, and even from paying for clothing which he had ordered to be purchased for her. But all this occurred years after the making of the will now offered for probate. The visit of this niece to the testator, with which this branch of the case commences, did not occur until 1864, and it is difficult to see how any conduct of Mrs. Brick at that time could have influenced the will made in 1860.

The same observation applies to his treatment of his brother Edward K. Brick. It is alleged that Mrs. Julia E. Brick exerted her influence over her husband to induce him to withdraw his support from Edward, and to alienate his affections from him, and finally to turn him off after having induced him to break up his home in the west. But all this branch of the case begins in the year 1864. No effort to create any estrangement before that time is shown. The omission to provide for Edward in the will of 1860 cannot be attributed to what occurred four years afterwards. All the testimony relating to the man Gildersleeve, his poisoning the testator's mind against Edward, and Mrs. Brick's causing Gildersleeve to be retained in the employ of the testator, and Edward to be dismissed, occurred in 1864.

As to John E. Brick, the only evidence relating to a period anterior to the making of the will, is, that when the testator proposed, in 1854, to bring John from Vicksburg, Mrs. Brick advised against it, and said he was better off where he was. In 1857, however, the testator did cause John to come to him, and offered him work, and it is said that Mrs. Brick stated that John wanted to be foreman, and she did not think him capable of being foreman, and that after being employed for some time, he was superseded by a brother of Mrs. Brick. All the other evidence in relation to John E. relates to occurrences in 1864, after John E. had been in the confederate army.

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As to Samuel R. Brick, it is claimed that in early life he had materially aided the testator in establishing him in business, and otherwise, and that to him the testator owed the foundation of his fortune, but that Mrs. Julia E. Brick was determined that the testator should be alienated from him, and that she would prevent their meeting. These allegations are sought to be sustained by the testimony of the contestant, Edward K. Brick, his wife Catharine, and daughter Mary E., as to declarations of Mrs. Julia E. Brick, to the effect that she would prevent Samuel and the testator from meeting again. But all these declarations were made in 1864, and there is no proof of any attempt, prior to the date of the will, to interfere with the intercourse between the brothers.

Mrs. Catharine Brick testifies that the reason assigned by Mrs. Julia E. Brick for desiring that Samuel and the testator should not meet again was that they always quarreled when they met, and she had made up her mind that the testator should never see Samuel nor any one of the family if she could prevent it; that that would be the best course he could pursue; this was in 1864. It is also testified to by Samuel R. Brick that, on the occasion of the testator's illness in 1864, a request was communicated to him from Mrs. Julia E. Brick that he should not come to the house at that time, and that accordingly he did not go there again till the fall of 1865. All the evidence of the interference to prevent intercourse between the brothers relates to the year 1864, and proceeds from the contestants and their children, with the exception of the testimony of Jonathan P. Smith. This gentleman visited the testator at his house in Brooklyn, in, as he states, the last of May or June, 1860, which was after the will had been made. Samuel R. Brick had spent a night at the house at the same time. The following day at dinner, the testator and his wife being present, a conversation took place about Samuel coming to New York, and the witness says he thinks the testator said he thought Samuel was expecting to get something from his estate, and Mrs. Brick said he would be mistaken, that, if she could help it, he would not get any

thing; that she didn't want the money wasted in the extravagant way that Samuel lived, or words to that effect. The will had then been made, though Mrs. Brick was ignorant of it, as she testifies. The expression by Mrs. Brick of her opinions and wishes, in regard to the dispositions to be made by the testator, did not amount, of itself, to undue influence, so long as she did not use unfair or improper means to have her wishes carried out, and the testator was competent to form his own judgment and act in accordance with it.

Mrs. Winchester testifies, without locating the time, that Mrs. Brick told her that the testator should not leave Samuel's children, nor John, nor Edward, any thing if she could help it, and that she was not willing to have the testator do anything for her (the witness). This witness also testifies to many facts for the purpose of showing that Mrs. Brick estranged the affections of the testator from her and her children, and caused her to be expelled from his house in 1855. That a serious difficulty then arose between the testator and Mrs. Winchester is very certain. She attributes it to the influence of Mrs. Brick. Her allegations in this respect are controverted. Some light is thrown upon the state of feeling existing between Mrs. Winchester and her brother by the letter which she addressed to him on leaving, in which she threatens to sue him, and indulges in many intemperate expressions towards him. That ended their intercourse, and from the excited state of feeling disclosed by that witness her testimony should be taken with many grains of allowance. She is the only relative to whom the testator had, as far as appears, ever left any thing by any will. By a will made in 1852 he had bequeathed to her $8,000, but after this quarrel he made the will of 1855, omitting any provision for her.

Much testimony was introduced on the part of the contestants for the purpose of showing the degree of influence which Mrs. Brick exerted over the conduct and actions of the testatator, but on the other hand the evidence is very strong to show that he was possessed of a firm and independent will, and we think that the preponderance of the testimony is to

the effect that at the time of the execution of the will in question he was in the full possession of his faculties, and that it was his free and voluntary act, uncontrolled by any improper influence of his wife, and was in accordance with the purpose which he had entertained for a long period of years. He had the right if he chose to exclude his brothers and sister from participation in his estate, and although a disregard of the claims of kindred is a circumstance to be considered in determining cases of this description, yet it is not controlling, nor is it necessary that the motives of the testator for so doing should be satisfactory to the court, provided we are satisfied that it was the real intention of the testator, and not the result of moral coercion, or deception practiced upon him. (*Clapp* v. *Fullerton*, 34 N. Y., 191; *Seguin* v. *Seguin*, 3 Keyes, 663, 669.) His repeated declarations, testified to by numerous disinterested witnesses, show a state of feeling towards his brothers which accounts for his not providing for them by his will without reference to any interference of his wife. His brother John he called a professional gambler. In 1857 the testator stated that he had given him $500 for his expenses in coming north and for the support of his family in his absence, but that John had, as he supposed, gambled it away on his passage, and that when he sent him back he gave him a gold watch, which he pawned, and bank stock, which he lost; that he was his own enemy, and one it was useless to try to help. With Edward he appears to have had little or no intercourse from 1846 to 1864, except sending occasional assistance to his family, and there seems to have been some delinquency on his part, for Edward in his letters to testator in 1864 promises to make amends for the past. As to Samuel, he was shown to be wealthy. The testator declared that he did not intend to leave him any thing; that he would leave it to a public institution first; that he did not need it, and lived extravagantly, and his children were extravagantly brought up; that he should have none of his money to buy diamonds with, etc., etc. The testator appears to have had very distinct notions of his own as to his relatives, and we are

not left to presume that his omission to provide for them was the result of the interference of any third party. There are many circumstances in the case on both sides, which we have not overlooked, though we have not deemed it essential to comment upon them, but on the whole evidence we are of opinion that the competency of the testator is sufficiently established, and that the contestants have failed to make out a case of undue influence or fraud which should vitiate the will.

A point is made in reference to a motion of the contestants to strike out the testimony of Mr. Ingraham as to conversations with the testator in 1867, on the ground that they were privileged communications. The surrogate reserved the decision of the motion until the close of the case. This course does not appear to have been objected to by the counsel for the contestants, and the motion does not appear to have been disposed of. No point, therefore, arises here. Even if the motion had been erroneously denied, that would not have been ground for reversal. In this class of cases the admission of improper evidence is not ground of reversal if it appear on the whole case that the will was properly admitted to probate. (*Clapp* v. *Fullerton*, 34 N. Y., 195; *Schenck* v. *Dart*, 22 id., 421.)

The same observation applies to the admission of Mrs. Brick's testimony, that she had no communication with the testator on the subject of making the will. Besides, this evidence was not introduced for the purpose of showing any admission of the testator, but bore upon the conduct of Mrs. Brick. The objection that the heirs of the contestant John E. Brick (who died pending the hearing in the Surrogate's Court) have not been brought in as parties, does not appear to have been taken either in the Surrogate's Court or in the Supreme Court, although the heirs of John E. Brick were parties to the proceeding in the Supreme Court. The surrogate only acquired jurisdiction of the subject-matter and of the persons of all the parties in interest at the commencement of the proceedings. He was not divested of this jurisdiction

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by the death of one of the parties. The survivors went on before him without objection, and tried the case upon its merits, and the heirs of John E. Brick appeared in the Supreme Court on the appeal, but raised no point there as to not having been cited before the surrogate. Whether or not the representatives of John E. Brick were in fact represented before the surrogate does not appear. Whatever effect the death of John E. Brick, pending the hearing and the omission to bring in his heirs or representatives, may have upon their rights, and this it is not now necessary to determine, such omission cannot impair the validity of the proceedings as against the other parties who appeared and litigated without objection.

The judgment of the Supreme Court should be affirmed, with costs.*

All concur.

Judgment affirmed.

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EDWARD F. DE LANCEY, Executor, etc., Respondent, *v.* OSCAR H. STEARNS et. al., Appellants.

One who, either with or without notice of a prior unrecorded mortgage, takes a mortgage or conveyance of land as security for an existing debt, without giving up any security or divesting himself of any right, or doing any act to his own prejudice, on the faith of the title, is not a *bona fide* purchaser for value within the meaning of the recording act (1 R. S., 756, § 1), and as against him the prior mortgage is valid.

An assignee, for value, of the subsequent mortgage, or grantee for value, claiming under the subsequent deed, stands in no better position than the mortgagee or original grantee.

Jackson v. *Van Valkenburgh* (8 Cow., 260); *Fort* v. *Burch* (5 Den., 187) distinguished.

(Argued March 29, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming

* The direction as to costs was subsequently modified so that the judgment was without costs to either party as against the others in this court

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a judgment in favor of plaintiff, entered upon a decision of the court at Special Term.

This action was for the foreclosure of a mortgage given by defendants Jane B. Hyde and William A. Hyde, her husband, to plaintiff, dated July 1, 1870, on certain premises in Brooklyn. The mortgage was not recorded until October 25, 1873.

The court found, in substance, that, after the giving of said mortgage, and about October 1, 1870, said Jane B. Hyde, with her husband, executed a mortgage upon the premises to Bradley and Currier, to secure the payment of a pre-existing debt, $1,500, and with the agreement that the same was a second mortgage, which mortgage was duly recorded January 25, 1871, and which, after various intermediate assignments, was assigned to defendant, Olive W. Richardson; all of which assignments were duly recorded and were without consideration, and with notice of plaintiff's prior equity and lien; that, on April 4, 1871, said Jane B. Hyde mortgaged the premises to Charles G. Larned to secure $2,000, which mortgage was assigned to defendant Stearns July 18, 1872, and was without consideration and fraudulent; that said mortgage and assignment were duly recorded; that, on December 6, 1871, said Jane B. Hyde and husband deeded the premises to Dwight Hyde, it being stated in the deed that it was "subject, nevertheless, to all incumbrances on the said premises;" that said Dwight Hyde, by deed containing the same clause, dated September 23, 1872, conveyed the premises to defendant Oscar H. Stearns, both of which deeds were without valuable consideration, and were with full notice to the grantees of plaintiff's mortgage; said deeds were duly recorded prior to plaintiff's mortgage; that Stearns, in December, 1872, executed a mortgage on the premises, for $2,000, to said defendant Richardson, which was given without consideration, and with notice of plaintiff's mortgage; that, on July 8, 1873, said Stearns conveyed the premises to one Joseph A. Hyatt, Jr., who on the same day, mortgaged the same to Charles H. James to secure the payment of $2,500, and then, upon the same day, reconveyed the premises by deed to said Stearns;

that the mortgage was assigned July 11, 1873, by James to defendant Polhemus; that said deeds mortgage and assignments were duly recorded prior to plaintiff's mortgage, but were without consideration, fictitious and fraudulent. Further facts appear in the opinion.

As conclusions of law, the court found that plaintiff's mortgage was a valid lien, prior to the liens created by said other mortgages, and prior to any liens or claims of the defendants.

D. P. Barnard for the appellants. A *bona fide* assignee of a mortgage, without notice of a prior unrecorded mortgage, is not affected by notice to the mortgagee if his assignment is recorded before the prior mortgage. (*Jackson* v. *Van Valkenburgh*, 8 Cow., 260; *Ely* v. *Scofield*, 35 Barb., 330; *Jackson* v. *Given*, 8 J. R., 137; *Dey* v. *Dunham*, 2 J. Ch., 182; *Freeman* v. *Schroeder*, 43 Barb., 618.)

Geo. C. Genet for the respondent. The recording acts only have reference to *bona fide* purchasers for value without notice. (*Jackson* v. *Post*, 15 Wend., 588; *Van Rensselaer* v. *Clark*, 17 id., 25; *Weaver* v. *Barden*, 49 N. Y., 291; *Wood* v. *Robinson*, 22 id., 264; *Cary* v. *White*, 52 id., 138.) The mortgage to Bradley and Currier was not a lien prior to plaintiff's. (*Dickson* v. *Tillinghast*, 4 Paige, 215; 49 N. Y., 293; 52 id., 138; *Schaffer* v. *Reilley*, 50 id., 66; *Van Rensselaer* v. *Stafford*, Hopk., 569; *Reeves* v. *Kimball*, 40 N. Y., 311; *Bush* v. *Lathrop*, 22 id., 535; *Ballard* v. *Burgett*, 40 id., 314; *Mason* v. *Lord*, id., 486; *Sheldon* v. *Edwards*, 35 id., 285.)

RAPALLO, J. The omission of the plaintiff to record his mortgage rendered it void only as against subsequent purchasers, in good faith for value, whose conveyances should be first duly recorded.

The appellant Oscar H. Stearns does not occupy that position. The judge finds that the deed to him from the

mortgagors was without any valuable consideration, and was received by him with full notice of the plaintiff's mortgage. By the terms of the deed, the property was conveyed to him "subject to all existing incumbrances on said premises." In his answer, he denies the allegation in the complaint that the conveyance was without consideration and fraudulent, but he does not allege what the consideration was or that he paid any. He testified upon the trial that the consideration was money advanced and to be advanced to Dwight Hyde, one of the grantors. That he had advanced a good deal, probably $8,000 or $10,000, but he does not allege that he advanced any after the conveyance or upon the faith of it, and the fair inference from his testimony is that he did not, inasmuch as he testified that, at the time of his examination, the account between him and Hyde was unsettled, and, as far as he could tell, the unsettled matters amounted to between $4,000 and $5,000. On his own showing, therefore, he appears to have taken this conveyance as security for an unsettled account. This would not constitute him a *bona fide* purchaser for value, and, irrespective of the question of notice, the judge's finding that the deed was without valuable consideration is sustained by the evidence.

The mortgage for $2,000 given by Stearns to the appellant Olive W. Richardson is also found by the judge to have been given without consideration or value. In her answer, she does not set up that she paid value therefor. She simply ignores the allegations of the complaint, and she did not prove upon the trial that she had paid such value.

The mortgage of $2,500 held by the appellant Polhemus was originally made to one James, without consideration, for the purpose of being negotiated, and was afterwards assigned by him to Polhemus. We think that upon the evidence the judge was justified in discrediting the statement of Polhemus as to his being a *bona fide* purchaser of the mortgage for value.

The $2,000 mortgage given by Mr. and Mrs. Hyde to Larned, and by him assigned to Burton, and by Burton to

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Stearns, is not shown to have been given originally for value, and the testimony of Stearns, as to what he gave for it, is very loose and unsatisfactory. He says he thinks he gave the full amount of it to Mr. Hyde when he took it, but that he had so many transactions of the kind he could not recollect the particulars; afterwards, he says he gave him a protested note. We think the finding of the judge that this mortgage was without consideration is sustained by evidence.

The only remaining question in the case arises upon the $1,500 mortgage made by Mr. and Mrs. Hyde to Bradley and Currier, and subsequently assigned to the appellant Olive W. Richardson. It is claimed that the uncontroverted evidence shows that Bradley and Currier paid value for this mortgage, and also that the appellant Richardson paid value for it when assigned to her, and that, although Bradley and Currier had notice of the prior mortgage, and took theirs subject thereto, yet that their *bona fide* assignee without notice is not bound by the notice to them. The case of *Jackson* v. *Van Valkenburgh* (8 Cow., 260) holds that where a party takes a mortgage with notice of a prior unrecorded mortgage, and with the understanding that he is to take his mortgage subject to the previous one, he cannot claim priority, but that his *bona fide* assignee, without notice of the prior unrecorded mortgage, is not affected by the notice to his assignor. *Fort* v. *Burch* (5 Denio, 187) recognizes this doctrine, with the qualification only that the assignment must be recorded before the prior mortgage is recorded. If the mortgage to Bradley and Currier had been given for value, in the sense in which that term is used, with reference to the question, what constitutes a *bona fide* holder, and the only difficulty were the notice to Bradley and Currier of the prior unrecorded mortgage, the cases cited would be authority in favor of the appellant Richardson. But the further difficulty exists that the judge has found that the mortgage to Bradley and Currier was given in payment of a pre-existing debt, and has not found that any security was relinquished or new consideration given. It has been held in numerous cases that one who, without notice of a prior

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unrecorded mortgage, takes a conveyance of land in payment of an existing debt or as a security therefor, without giving up any security, divesting himself of any rights, or doing any act to his own prejudice on the faith of the title, before he has notice of the mortgage, is not a *bona fide* purchaser. See, for a valuable consideration within the meaning of the recording acts, *Dickinson* v. *Tillinghast* (4 Paige, 215), *Evertson* v. *Evertson* (5 id., 644, and cases cited), *Weaver* v. *Bardon* (49 New York, 286).

Although, on the question of notice, the *bona fide* assignee of the mortgage for value may stand in a better position than the mortgagee, she cannot, on the question of the consideration of the mortgage, either as between her and the mortgagor or third parties. (*Schaffer* v. *Reilly*, 50 N. Y., 66.)

The judgment should be affirmed, with costs.

All concur. FOLGER, J., absent.

Judgment affirmed.

THE PEOPLE ex rel. DOUGLAS TAYLOR, Appellant *v.* THOMAS DUNLAP, Respondent.

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170 [2]191
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The office of commissioner of jurors, created by the act of 1847, "in relation to jurors of the city of New York" (chap. 495, Laws of 1847), was not made thereby distinctively a county office, nor did the commissioners succeed to powers theretofore exercised by an officer of the county of New York.

Assuming, however, that it was a county office, it was a new office created by the act; the legislature had power subsequently to change its character from a county to a city office, and to provide for a different mode of appointment.

The provision, therefore, of the act of 1873, "to reorganize the local government" (chap. 335, Laws of 1873), vesting the power of appointment of commissioner of jurors in the mayor and common council, which made the office distinctively a city one, whatever had been its previous character, is embraced in the subject expressed in the title of the act, and so not in conflict with section 16 of article 3 of the State Constitution; and an appointment to the office in accordance with the provisions of said act of 1873 is valid.

(Argued April 5, 1876; decided May 23, 1876.)

Opinion of the Court, per ANDREWS, J.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of defendant, entered upon a verdict.

This action was in the nature of a *quo warranto* to determine the title to the office of commissioner of jurors.

The relator was appointed to that office May 31, 1864, under the provisions of the act creating it (chap. 495, Laws of 1847), and continued to act until displaced by defendant, who was appointed July 22, 1875, under the provisions of the city charter of 1873. (Chap. 335, Laws of 1873.) Further facts appear in the opinion.

A. Oakey Hall for the appellant. The act of 1873, under which the respondent was appointed, was violative of section 16, article 3, of the Constitution. (*People ex rel. Rochester* v. *Briggs*, 50 N. Y., 558; *Harris* v. *People*, 59 id., 602.)

Wm. M. Evarts for the respondent. The title to the charter of 1873, under which defendant was appointed, was sufficiently comprehensive. (*People* v. *Comrs. of Taxes*, 47 N. Y., 501; *Huber* v. *People*, 49 id., 132; *Sullivan* v. *Mayor*, 47 How. Pr., 491.)

ANDREWS, J. The office of commissioner of jurors, the title to which is in controversy in this action, was created by chapter 495 of the Laws of 1847, entitled "An act in relation to jurors in the city of New York."

The general purpose of the act, as its provisions indicate, was to provide a system for ascertaining the persons liable to perform jury duty in the city of New York, and for distributing the jury service, and enforcing its performance in aid of the administration of justice by the courts of general and local jurisdiction therein.

Prior to the act of 1847, the mode of selecting jurors in the city of New York was regulated by the Revised Statutes. Each ward was deemed a town for the purpose of returning jurors, and the statute imposed upon the common council the

duty to "provide by ordinance the manner in which, and how often, the selection [of jurors] should be made, and the officers and persons by whom it shall be conducted." (2 R. S., 413, § 31.) The common council, in pursuance of the authority and duty thus given and imposed, appointed and designated the assessors of the several wards to prepare the lists of jurors, and when prepared they were returned to the county clerk, and the subsequent proceedings were had in accordance with the general law of the State upon the subject. (Corporation Ordinances [edition 1845], § 22.) The provisions of the Revised Statutes for the selection and return of jurors for the city of New York were not new in imposing upon the common council the duty of providing for the return of the jury lists. The same provisions, in substance, were contained in the Revised Laws of 1813, as modified by the act of 1825. (1 Revised Laws, 329, § 13; Laws of 1825, 131, § 1.)

The act of 1847 made a radical change in the mode of selecting jurors for the city of New York. By the second section it was provided that there should be a commissioner of jurors to be appointed by the supervisors of the city, the judges of the Superior Court, and the judges of the Court of Common Pleas. The act made it the duty of the commissioner of jurors to prepare jury lists, containing the names of persons subject to jury duty in the city; to hear and determine claims for exemption, and when the jury lists were completed, to return them to the county clerk, and certain powers were vested in him in respect to the imposition and remission of fines upon defaulting jurors, which had theretofore been exercised by the courts. The fines collected were to be paid into the county treasury, and the supervisors were directed (§ 11) to allow the commissioner out of the fines, etc., a reasonable compensation, and to provide him (§ 12) with books, stationery and a suitable room for an office. He was required (§ 2) to execute to the mayor, aldermen and commonalty, an official bond in the penalty of $5,000, to be approved by the mayor.

It will be seen from this reference to the provisions

of the act, that the commissioner of jurors, succeeded to the power theretofore vested in ward assessors under the ordinance of the common council in respect to the preparation of jury lists, but the act had a broader scope, and aimed, by concentrating powers and duties which had before been distributed between the local officers and the courts, in a single person, to establish a more complete and efficient administrative system for the regulation of the jury service in the city. Another act upon the same subject is chapter 539 of the Laws of 1870. It contains many additional provisions in furtherance of the general purpose of the act of 1847. It provides for a fixed salary to the commissioner of jurors, and directs that it shall be paid by the comptroller of the city (§ 17) and the commissioners of taxes, the commissioners of police, and all other officers of the city are directed (§ 13) to render all the assistance in their power to enable the commissioner of jurors to procure the names of persons liable to jury duty.

The relator, in May, 1864, was appointed commissioner of jurors by a convention composed of the judges of the Superior Court and Court of Common Pleas, and the supervisors of the city, and entered upon the discharge of the duties of the office, and continued to act as commissioner until July 22, 1875, when the defendant, upon the nomination of the mayor, and the confirmation of the board of aldermen, acting under the authority of an act entitled "An act to reorganize the local government of the city of New York," being chapter 335 of the Laws of 1873, was appointed commissioner of jurors. By the twenty-fifth section of that act it is provided that "the mayor shall nominate and, by and with the consent of the board of aldermen, appoint the heads of departments and all commissioners, * * * and also members of any local board, and all other officers not elected by the people, including the commissioner of jurors."

The defendant assumed to act as commissioner of jurors under his appointment, and has ever since remained in possession of the office. No question is raised as to the regularity of his appointment under the act of 1873; and his title

to the office is challenged on the single ground that the provisions of the act vesting the power of appointment of commissioner of jurors in the mayor and aldermen is in conflict with section 16 of article 3 of the Constitution, in that the subject of the appointment of a commissioner of jurors is not a subject expressed in the title. The more specific ground upon which the objection is based is, that the commissioner of jurors created by the act of 1847 was a county officer, and that a change in the mode of appointment could not constitutionally be made by an act which, by its title, relates to a reorganization of the city government of the city of New York. The body of the act of 1873 deals with the corporate powers of the city, and, in substance, is a revision of the city charter, and the title indicates that this was the subject of the enactment. If the legislature, in enacting a city charter, should undertake therein to prescribe the mode of appointment of an officer whose character as a county officer was indelibly fixed by constitutional provision, there would be much reason for claiming that the act, in this respect, would violate the constitutional provision referred to. The subject of the appointment of a county officer would not be understood as being comprehended within the title of an act which related to the powers and functions of a city government. It would be another and distinct subject, and one not expressed in the title.

The act of 1847 creating the office of commissioner of jurors did not, in terms, make it a county office; and neither the mode of appointment or the functions which the officer was to exercise made him distinctively a county officer. The power of appointment was vested in the persons who at the time were supervisors of the city, acting in conjunction with the judges of two of the local courts; but the supervisors, in exercising the power conferred, did not act as a board in their corporate capacity, but as individual officers clothed by the legislature, in connection with the judges, with a specific authority. It may be observed, also, that the supervisors were at the same time the aldermen of the city. Nor did the

commissioner of jurors succeed to powers which had theretofore been exercised by an officer of the county of New York. The selection of jurors by the general law of the State had always been committed to town as distinguished from county officers, and, as has been shown, in the city of New York this duty had, for a long time prior to the act of 1847, been performed by the common council, or by officers acting under its direction, and the other authority and functions with which the commissioner of jurors was invested by the act had not before been possessed or exercised by county officers. The jury lists, which the commissioner was directed to prepare, were to be made up from the whole body of the citizens of the county of New York liable to jury duty, but this was equally true of the lists which, before the act was passed, were prepared by the ward assessors. We have referred to the provisions in the act of 1847, requiring the commissioner to execute an official bond to the city, and to the fact that by the act of 1870, his salary was to be paid by the city comptroller, and also to the provision requiring the city officers to aid him in procuring the names of persons liable to serve as jurors. These provisions indicate that the legislature did not, in creating the office of commissioner of jurors, have in view the creation of a county, as distinguished from a city, office.

We have thus far assumed the proposition stated by the learned counsel of the relator to be true, viz., that if the commissioner of jurors appointed under the act of 1847 is to be regarded as a county officer, the legislature could not, in an act for the reorganization of the city government, make him a city officer and change the mode of appointment. But we do not assent to this view. The act of 1847 created a new office and provided for the appointment, by local authorities, of an officer to discharge its duties. These duties were local and concerned the interests of the people within the territory of the county of New York, but this population and territory were identical with those of the city of New York. It was competent for the legislature to make it a city or county office, and to vest the power of appointment in city or county

authorities. Assuming that the commissioner of jurors, as constituted by the act of 1847, was a county officer, the legislature, by acting, lost none of its authority over the subject. It could thereafter abolish the office, or change its character from a county to a city office, and provide for a different mode of appointment. The whole subject was within the control of the legislature. What the legislature could have done originally, it could do by a subsequent enactment.

The act of 1873 vested the power of appointment of commissioners of jurors in the mayor and common council. This made it distinctly a city office, whatever may have been its previous character. The title of the act was notice that the legislature were dealing with the general subject of the municipal powers of the city of New York, and whatever powers were conferred by it upon the city government were comprehended in the general subject expressed in the title, viz., the reorganization of the local government of the city of New York.

In view of the anomalous relation existing between the city and county of New York, there is no incongruity in committing to the city government and to officers appointed by the city authorities, control of the subject of selecting and returning jurors, within the territory of the city and county, and certainly there is no defect of legislative power to provide that the jury system should be administered by city officers.

It is for the legislature to distribute the powers of local government, as between the city and county governments, as it may deem best, and this discretion, when not restrained or excluded by some provision of the Constitution, is absolute, and no such provision, applicable to the matter under consideration, exists.

We are of opinion that the subject of the appointment of a commissioner of jurors was embraced within the general subject expressed in the title of the act of 1873, and that the defendant was legally appointed to that office.

The judgment of the General Term should, therefore, be affirmed.

All concur. FOLGER, J., absent.

Judgment affirmed.

Statement of case.

WILLIAM GOURLEY, Administrator, etc., Respondent, *v.* JOSEPH CAMPBELL et al., Appellants.

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The will of H. directed his executors to close his business and place the proceeds thereof and all his "property, both real and personal, at interest on bond and mortgage, or otherwise, as in their judgment they may deem best," and to employ "the proceeds, *rents*, income or interest" for the support and maintenance of the testator's wife and children; he then devised and bequeathed all his estate, "both real and personal," to his children, to be divided upon the death of his wife. In an action for a construction of the will, *held*, that an intent to convert absolutely the real estate into money did not appear, and no such conversion was made by the will.

It appeared that the personal estate of the testator was amply sufficient to provide for the support and maintenance of the testator's widow and children. The real estate was not disposed of by the executors. *Held*, that as no necessity existed for a sale of the realty for the purpose specified in the will, to this extent the purpose had failed; and that the land retained its original character and descended to the heirs.

Gourley v. *Campbell* (6 Hun, 218) reversed.

(Argued April 6, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term. (Reported below, 6 Hun, 218.)

This was an action to obtain a construction of the will of James Hays, of Newburgh, N. Y., and for the appointment of a trustee to carry out the provisions of the will. The material clauses of the will in question are as follows:

"In the first place, I will and determine that my executors, hereinafter named, shall collect all sum and sums of money due to me from any person or persons whatsoever.

"That they shall close my store and other business and concerns, and settle the same; that from the proceeds thereof they shall liquidate and pay all debts, dues and demands owing by me to any person or persons whatsoever.

Statement of case.

"In the second place, my executors, to be hereinafter named, shall place the proceeds thereof, and all my property, both real and personal, at interest on bond and mortgage, or otherwise, as in their judgment they may deem best, and the proceeds, rent, income or interest, shall be employed and used for the support and maintenance of my beloved wife Elizabeth and my children William, Mary and James, and for the education of my said children.

Item: I hereby will and determine and authorize my said executors when, and as soon as my said children shall respectively come to and arrive at the period of lawful age for the transaction of business, to give to each of them not exceeding one thousand dollars to commence business for themselves, or at the time of their marriage, provided they marry with the consent of their mother, if she should then be living.

"*Item:* I will, devise and bequeath unto my said children, William and Mary and James, all my estate, both real and personal, of all kinds whatsoever, to be equally divided between them, share and share alike, upon the event of the death of their mother, my said wife, Elizabeth. I hereby nominate, constitute and appoint my well beloved friends Isaac Stevenson, grocer, John Thompson, blacksmith, and Archibald Hays, grocer, to be my executors for the purposes above named, hereby entrusting them with the management and control of all my concerns and estate, to manage and employ them for the benefit and behoof of my wife and children."

The testator died in 1828, leaving his widow and the three children referred to in the will him surviving. The three children all died intestate and unmarried prior to the death of the widow. The executors named in the will all died prior to 1868. The widow died intestate in July, 1870. No part of the real estate left by the testator was ever sold by the executors. The personal estate was ample for the support of his widow and children, and there remained thereof at the death of the widow over $9,000. The plaintiff, who is next of kin to Mrs. Hays, was appointed administrator with the will annexed. The defendants are the heirs of the testator.

Statement of case.

The plaintiff claimed, and the court below found, that the testator intended by the will to convert his real estate into personalty, and in equity such conversion was made. That upon the death of the testator all his estate vested in his children as personal property, subject to the maintenance of their mother, and upon the death of the last surviving child it vested in the mother as personal property, and the appointment of a trustee was directed to sell the real estate. To all of which findings defendants' counsel duly excepted.

Robt. Johnstone for the appellants. The particular purpose for which a conversion of the real estate was ordered by the will having failed, it retained its original character and descended to the heirs. (*Chitty* v. *Parker*, 2 Ves. Jr., 271; *Robinson* v. *Taylor*, 2 Bro. C. C., 589; *Hawley* v. *James*, 5 Paige, 447; *Smith* v. *Claxton*, 4 Mad. Ch.) A subsequent sale would vest no title even in a *bona fide* purchaser. (*Jackson* v. *Jansen*, 6 J. R., 73; *Sharpstein* v. *Tillou*, 3 Cow., 671; *Slocum* v. *Slocum*, 4 Edw. Ch., 613; *Randall* v. *Rookey Prec. Ch.*, 162, *Jessop* v. *Watson*, 1 Myl. & K., 665.)

C. F. Brown for the respondent. The will created a valid express trust in the executors. (2 Story's Eq., § 972; *Day* v. *Roth*, 18 N. Y., 448; *Malin* v. *Malin*, 1 Wend., 625; *Tracy* v. *Tracy*, 3 Bradf., 57.) A power in trustees to sell need not be given by express words, but may be implied from the terms of the will and the apparent intent of the testator. (Gerard's Titles to R. E., 442; *Morton* v. *Morton*, 8 Barb., 18; *Conover* v. *Hoffman*, 1 Bosw., 217; *Meaking* v. *Cromwell*, 5 N. Y., 136; 2 Sandf., 514; 3 Redf. on Wills, 131, 138; *Hamilton* v. *Buckmaster*, L. R., 3 Eq., 323; *Bogert* v. *Hertell*, 4 Hill, 492; *Livingston* v. *Murray*, 39 How., 105.) There was an equitable conversion of the real estate. (Adams' Eq., 286, 289; 3 Redf. on Wills, 140; 1 Roper on Legacies, 340, 358; *Stagg* v. *Jackson*, 1 Comst., 206; *Marsh* v. *Wheeler*, 2 Edw. Ch., 157; *Bramball* v. *Ferris*, 14 N. Y., 46; *Bunce* v. *Van der Grift*, 8 Paige, 37; *Dodge* v. *Pond*, 23 N. Y., 69.)

Opinion of the Court, per MILLER, J.

MILLER, J. The main question to be determined upon this appeal is, whether the testator intended an absolute conversion of his real estate into money, or what is called in law a conversion out and out, and a distribution of the same as personal property among the devisees named in the will. There are no explicit directions in the will which show clearly such an intention, and if it is to be considered as existing it must be derived from the construction to be placed upon certain provisions of the will under the rules of law applicable to such cases. While it is evident that the testator intended to provide for the support and maintenance of his wife and children, and the education of the latter, it is not clear, by any means, that he designed a conversion of his real estate into money, and a final distribution of the same as personal property. There are many features of the case which are utterly at war with such a theory, and it is not apparent that such a design actually existed. The clause which provides, that "my executors shall place the proceeds thereof, and all my property, both real and personal, at interest on bond and mortgage, or otherwise, as in their judgment they may deem best," is followed by a direction that the "proceeds, rent, income or interest shall be employed" for the support and maintenance of the testator's wife and children, and the education of said children. The use of the word "rent," in connection with the other terms employed, indicates that the testator expected and intended that a portion of his estate should remain or be invested in real estate, and that an investment in land would be within the meaning of the will. So, also, while the words "or otherwise" may be construed to refer to the mode of investment, they are also susceptible of another interpretation, and it may well be urged that they relate to the discretion of the executors to sell or not, according to their best judgment.

Independent of the difficulties referred to, an insuperable obstacle to a construction which converts the whole real estate into money, is the concluding portion of the will, by which the testator devises and bequeaths to his children by name all his "estate, both real and personal, of all kinds whatsoever, to be

equally divided between them, share and share alike, upon the event of the death of their mother." If the testator had designed that all his estate should be converted into money he would not have made a disposition of his real estate or of all kinds of property. These were his last words, and the last clause of a will is to be deemed an indication of his ultimate intention, unless it is plain from the entire will that a different intention existed, which is not apparent from the prior provisions of the will in question.

The authorities cited to sustain a contrary construction from the one stated present entirely different characteristics from the case now considered. Even if it may be considered that the clause of the will in which the testator uses the words "real estate" in the devise to his children contains no words of inheritance as the law stood when it was executed, yet the terms employed are too strong to resist the inference that the testator never intended that the real estate should be converted into money without any qualification whatever. The construction placed upon the testator's will leads to the conclusion that he made no such disposition of his real estate as to constitute an out and out conversion of the same into money.

The authorities fully sustain this position. In *White* v. *Howard* (46 N. Y., 162) Judge GROVER said: "To constitute a conversion of real estate into personal property, in the absence of an actual sale, it must be made the duty of the executors to sell in any event. A mere discretionary power to sell produces no such result." In *Wright* v. *Trustees of Methodist Church* (1 Hoff. Ch. R., 218) the vice-chancellor held, that if the disposition is made to depend upon the discretion of the trustee of the power the will is not imperative and does not convert the estate. There is no express direction in the will to sell, and it is only by implication that the power to sell can be upheld; and, if it did exist at all, it was qualified to the exercise of their best judgment, both as to sale and the nature of the investment of the proceeds thereof. These provisions are, at least, too indefinite and

uncertain to authorize the conclusion that the executors were bound to sell in any event.

In fact, the purpose of the testator was to provide for the support and education of his children and maintenance of his wife. The personal estate was ample for that purpose, and no necessity existed for a sale of the real estate; to this extent, therefore, the purpose has failed. The rule in equity is well settled that when a conversion of real into personal estate is ordered for particular purposes, and those purposes fail, the land retains its original character and descends to the heirs. In *Chitty* v. *Parker* (2 Ves., Jr., 271) the testatrix directed her real estate to be sold and all her estate to be converted into money for the purposes of her will. The will was satisfied without touching her real estate, and it was held that there was no equity for the next of kin against the heir, and that the heir takes all that which is not for a defined and specific purpose given by the will. The direction to sell was peremptory, which is not the case here; but, in both cases, the purpose has failed and the devise has been satisfied. (See, also, *Slocum* v. *Slocum*, 4 Ed. Ch., 613; *Jackson* v. *Jansen*, 6 J. R., 73; *Sharpsteen* v. *Tillou*, 3 Cow., 651; *Hawley* v. *James*, 5 Paige, 447; *Robinson* v. *Taylor*, 2 Brown's Ch. Cas., 595.) It cannot be claimed that these cases are inapplicable, as the purpose of the conversion was to enable the executors to sell, if they deemed it best, and it was necessary to support and educate the family of the testator; all of these have been fully answered without any sale, and hence the land has not been converted and descends to the heirs at law. There are other views which tend in the same direction and lead to the same conclusion. As, however, those already presented are sufficient to uphold the construction put upon the testator's will, it is not necessary to discuss them.

We have been referred to numerous cases which sustain the principle that, when the intent is manifest to convert into money, the whole estate is to be regarded as personal from the testator's death; but all of them are decisions where a sale

was ordered for the purposes of a division. Where the devisees were living, the division could not be made without a sale, and the intention was entirely clear; they are not, therefore, in point, and do not affect the question presented in the case at bar.

As it is manifest that the court below were in error, the judgment must be reversed, and as a question of law only arises which cannot be altered upon a new trial, judgment should be ordered for the defendants.

This is also a case where costs are in the discretion of the court, and the questions involved being difficult and intricate, we think the costs should be paid out of the property.*

All concur. FOLGER, J., absent.

Judgment reversed and judgment for defendants.

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CHARLES D. McMURRAY et al., Respondents, *v.* JOHN G. McMURRAY, Appellant.

Where an infant defendant in an action for foreclosure is served with process, but no guardian *ad litem* is appointed, and judgment is taken by default, the judgment is not void, but voidable.

In such case, where judgment is obtained by fraud and collusion, an action may be maintained on the part of the infant to set it aside as to him.

R. died seized of certain premises, which were mortgaged to defendant. R. devised to his widow, whom he made his executrix, a life estate in a portion of the premises, with remainder to plaintiffs; the balance, with his personal property, he directed his executrix to sell, and with the proceeds pay and discharge his debts, including the mortgage. Defendant, after R.'s death, commenced an action for foreclosure, making the widow and plaintiffs, who were infants, parties; they were served with process, but, although their infancy was known, no guardian *ad litem* was appointed. The widow answered, but under an arrangement with defendant that he would lease to her for life, at a nominal rent, a portion of the mortgaged premises, executed a deed to him of the portion of the premises directed to be sold, which was worth $5,950, for the

* The judgment was subsequently corrected as to costs by making it without costs as to either party against the other.

Statement of case.

nominal price of $500, to be applied on the mortgage. She withdrew her answer, and stipulated that defendant might take judgment, and allowed him to take judgment for the full amount of the mortgage, without crediting the $500. Judgment by default was taken against plaintiffs, under which the premises were sold and bid in by defendant for much less than their value. There was a surplus on the sale of over $2,000 which was never brought into court, and plaintiffs received no part of it. No report of sale was filed or confirmed. In an action to set aside the judgment and sale, *held*, that the executrix stood in a relation of trust towards plaintiffs, so far as the exercise of the power of sale was concerned, and violated her trust in conveying for a nominal consideration; that defendant was a party to its violation, and that the facts sustained a finding of fraud and collusion; that plaintiffs were entitled to have the decree of foreclosure avoided as to them, and could maintain an original action in equity for that purpose; that as to plaintiffs, their equity of redemption not being barred by the foreclosure, defendant, when he entered under his purchase, became merely a mortgagee in possession, and, as such, bound to account for their share of what he realized from the mortgaged property, over and above the mortgage debt.

Also *held*, that mere delay on the part of plaintiffs in asserting their rights, where the action was commenced within the time limited for the commencement of such actions, and where defendant had not been prejudiced by the delay, would not defeat plaintiffs' right of action.

(Argued April 10, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiffs, entered upon a decision of the court at Special Term.

This action was brought to set aside a judgment of foreclosure and sale, and the sale thereunder, and for an accounting by defendant, as mortgagee in possession.

The facts are sufficiently stated in the opinion.

Martin I. Townsend for the appellant. The omission to appoint a guardian *ad litem* did not render the judgment void. (*Rutter* v. *Puckhoffer*, 9 Bosw., 638; *Boleyn* v. *McEvoy*, 29 How. Pr., 278; *Croghan* v. *Livingston*, 17 N. Y., 221; *Austin* v. *Trustees, etc.*, 8 Metc., 196; *Rogers* v. *McLean*, 31 How. Pr., 279; *Fellows* v. *Niver*, 18 Wend., 563; *Hillyer* v. *Larzelear*, 9 J. R., 160.)

S. W. Jackson for the respondents. Plaintiffs have a valid and enforceable claim against defendant on the ground of fraud in the foreclosure action. (*Bloom* v. *Burdick*, 1 Hill, 139; Willard's Eq. Jur., 160; *Royal* v. *Wood*, 1 J. Ch., 406; *Patterson* v. *Bangs*, 9 Paige, 630; *Lasmer* v. *Wheelwright*, 3 Sand. Ch., 135; Story's Eq. Pl., § 426; Danl. Ch. Pl., 164; Cooper's Eq., 96.) The failure to appoint a guardian *ad litem* for the infants was fatal to the judgment. (*Kohler* v. *Kohler*, 2 Edw. Ch., 69; *Harvey* v. *Large*, 51 Barb., 222; *Alvord* v. *Beach*, 5 Abb., 452.)

RAPALLO, J. It is conceded that at the time of the entry of the decree of foreclosure against the plaintiffs, and at the time of the sale of the mortgaged premises, the plaintiffs were infants, and that no guardian *ad litem* had been appointed for them in the action. The judgment was entered by default. They had, however, been served with process and the judgment entered against them, though voidable was not absolutely void. (*Bloom* v. *Burdick*, 1 Hill, 130, 143; *Barber* v. *Graves*, 18 Vt., 290; *Austin* v. *Trustees, etc.*, 8 Met., 196; *White* v. *Albertson*, 3 Dev. [N. C.], 241; *Croghan* v. *Livingston*, 17 N. Y., 218; 7 Robt., 147; id 546.)

In actions at law, where an infant appeared by attorney or suffered a default, and judgment was entered againt him, his remedy before the Code was by writ of error to reverse the judgment, and the infancy was assigned as error in fact. (*Arnold* v. *Sandford*, 14 J. R., 417.) But a party to an erroneous judgment, who was not entitled to a writ of error to reverse it, might avoid it on motion or by a plea in a court of competent jurisdiction. (8 Metc., 204.) Under the English practice, an infant aggrieved by a decree in equity, might impeach it by an original bill, in which it was enough for him to say that the decree was obtained by fraud and collusion, or that no day was given him to show cause against it. (*Richmond* v. *Tayleur*, 1 P. Wms., 737; note.)

In the present case, the plaintiffs not only allege their infancy and the erroneousness of the judgment, but also that

it was obtained by fraud and collusion, and the court has found as facts that the agreement between the defendant and the step-aunt of the plaintiffs, who was also executrix of their uncle's will, whereby she withdrew her answer in the foreclosure suit, and conveyed to the defendant part of the mortgaged premises, and consented that judgment be entered, was fraudulent and made in consideration of an agreement that the defendant should give her a life lease of part of the mortgaged premises at a nominal rent. That it contemplated a purchase by the defendant, and was part of a plan to enable the defendant to secure to himself the mortgaged premises, and not merely to collect the mortgage debt, and that the transactions between the defendant and the executrix were a wilful violation or utter disregard of the rights of the plaintiffs.

The mortgaged premises consisted of lots on Seventh street, Troy, having an aggregate frontage of 180 feet on that street. They were owned by Robert D. McMurray, the uncle of the plaintiffs, who mortgaged them to the defendant, his brother, for the sum of $10,000, in 1856. Robert D. McMurray, the mortgagor, died in January, 1860, leaving a will whereby he devised to his widow Mrs. Caroline A. McMurray a life estate in 128 feet front of these premises, with remainder in fee in nine-twentieths of these 128 feet to the plaintiffs; all his real estate not disposed of by the will (including the remaining fifty-two feet of the mortgaged premises) and his personal estate not disposed of, he ordered his executrix to sell and convert into money and with the proceeds to pay and discharge his debts, including the mortgages and incumbrances upon the lots in Seventh street, which had been devised as before mentioned, viz., the 128 feet in which the plaintiffs had a remainder in fee. He appointed his wife, Caroline A., executrix of the will.

In May, 1860, after the death of the testator, the defendant commenced an action for the foreclosure of the mortgage. The executrix put in an answer setting up as defences, usury, payment and a counter-claim. The plaintiffs in this action

were made defendants in the foreclosure suit, but no guardian *ad litem* was appointed for them, although their infancy was known to the defendant, the plaintiff in that action. After the action had progressed some months, an arrangement was entered into between the executrix and the defendant, who was plaintiff in the foreclosure suit, whereby, under the power of sale contained in the will, instead of selling the fifty-two feet for their full value (which is found by the referee to have been $5,950), and applying the proceeds to the reduction of the mortgage, she conveyed them to the defendant for the nominal price of $500. She withdrew her answer in the foreclosure suit, and stipulated that the defendant might take judgment therein, and allowed him to take such judgment for the full amount of the mortgage, with interest and costs, without crediting any thing for the fifty-two feet conveyed, and without procuring the appointment of any guardian for the infant defendants (the present plaintiffs). Judgment of foreclosure and sale of the whole premises was entered, and they were bought in by the defendant for $14,000, which is found to have been much less than their value. There was a surplus of over $2,000, but it was never brought into court, and the infants received no part of it, but it was disposed of by some arrangement between the defendant and the executrix. No report of sale was ever filed or confirmed.

The defendant appears to have entered into possession under this purchase, and to have realized from sales and insurance about $19,500, of which about $15,500 were the proceeds of the 128 feet.

The executrix, in consideration of the arrangement under which the judgment was thus obtained, received from the defendant a lease, for her life, at a nominal rent, of one of the houses on the 128 feet.

Upon these facts, we do not think it can be successfully argued that the finding of collusion and fraud is unsupported by evidence.

The executrix clearly stood in a relation of trust towards the infants, so far, at least, as the execution of the power of

sale of the fifty-two feet was concerned. That land had been, by the will, made part of a fund primarily applicable to the discharge of the mortgage in exoneration *pro tanto* of the 128 feet in which the infants had a remainder in fee; and it was her duty to have obtained, as nearly as possible, the full value of the land, and secured the application of it in reduction of the mortgage. If she conveyed to the mortgagee, she should have done so in such manner as to attain this result. The 128 feet appear to have been of sufficient value to have satisfied the balance which would have remained due on the mortgage, and to have left a considerable surplus. Though the property might have been sacrificed at a forced sale, the executrix had no right to make a voluntary conveyance for a nominal consideration. The defendant had full notice of the trust, and was a party to its violation, and knew that he was proceeding under a judgment which was erroneous as to the infants, and that they were not represented in the proceeding, and that he was taking judgment for more than was due to him. We are of opinion that, under the circumstances, the decree of foreclosure was, as between the plaintiffs and defendant, ineffectual to bar the equity of redemption of the plaintiffs, and that they were entitled to have it avoided, and could maintain an original action in equity for that purpose. (*Wright* v. *Miller*, 8 N. Y., 9.) It is clear that great injustice was done to these infants, and that the proceedings against them were erroneous. Although the judgment may not be void, so as to impair the title of *bona fide* purchasers from the defendant, after the lapse of time which has taken place, yet, as between him and these plaintiffs, he has no equity which should entitle him to retain the fruits of the erroneous and fraudulent proceeding, or to prevent them from avoiding it.

The consequence of avoiding the decree, as to these plaintiffs, is, that as to their nine-twentieths of the premises, their equity of redemption was not barred by the foreclosure sale, as between them and the defendant; and as to them, the defendant, when he entered under his purchase, became

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merely mortgagee in possession. Although he acquired an apparent title, which may have entitled him to convey a title to a purchaser, which the plaintiffs have, by their laches, lost the right to impeach, yet the defendant was, we think correctly, held by the court below, bound to account to the plaintiffs for their share of what was realized, over and above the mortgage debt. No complaint is now made that this account has not been correctly taken.

Although there has been great delay on the part of the plaintiffs in asserting their rights, yet they have done so within the time limited by the statute for bringing this kind of action. They allege, as an excuse for the delay, that they did not think that, under the will, they had any right in the premises which they could enforce during the life of Catharine A. McMurray, who did not die until 1869. The defendant has not been prejudiced by the delay; he is simply required to refund what he has received, over and above what was due to him, and he shows no equity which should require us to hold the plaintiffs to be barred of their right of action within any time shorter than that limited by the statute.

The judgment should be affirmed, with costs.

All concur. FOLGER, J., absent.

Judgment affirmed.

PATRICK KING, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

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An owner of real property is not liable for injuries resulting from negligence on the part of a contractor or his employe engaged in performing a lawful contract for specific work upon the premises. The law will not impute to one person the negligent act of another unless the relation of master and servant exists.

Where the owner of an instrument or piece of machinery not in its nature dangerous allows another person competent to manage it to take and use it, and while in the possession and use of the other it becomes defective and injures a third person, the owner is not liable, and the

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fact that the right to use it was given under a contract by which it was to be used in performing work for the owner upon his premises does not change his liability.

One D. contracted with defendant to unload from vessels on to cars all the railroad iron brought to the dock at A. for a specified time and for a specified price, defendant to furnish a derrick to be used for the purpose. Defendant furnished a derrick suitable and safe at the time for use. Plaintiff was employed by D. to assist and was injured by a fall of the derrick. In an action to recover damages for the injury, *held*, that if D. was chargeable with negligence in omitting to inspect and repair the derrick, defendant was not responsible therefor; that in the absence of a contract to that effect no duty on the part of defendant to keep the derrick in repair could be implied; that the rule requiring a master to furnish safe and suitable machinery for the use of his servants did not apply, as plaintiff was not the servant of defendant; and that therefore a charge that in the absence of a special agreement defendant was bound to keep the derrick in repair, was error.

Defendant's evidence tended to show that it was to make repairs when notified by D. that repairs were necessary. The court charged that if this were so and no notice was given, if the agreement was not known to plaintiff and the accident occurred from neglect to repair without negligence on the part of plaintiff, defendant was liable, *held*, error.

King v. *New York Central and Hudson River Railroad Company* (4 Hun, 769) reversed.

Coughtry v. *Globe Woolen Company* (56 N. Y., 124) distinguished.

(Argued April 12, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment on a verdict. (Reported below, 4 Hun, 769.)

This action was brought to recover damages for injuries alleged to have been sustained through defendant's negligence.

A track of defendant's railroad in the city of Albany runs close along by the dock. Defendant had placed a derrick on this dock to aid in transferring rails from boats to cars. In the spring of 1872 it entered into a contract with one Dillon, by which the latter agreed to unload from barges and vessels and place upon cars all the railroad iron brought to the dock for defendant, and during the season of navigation, for six cents a rail. Dillon was to have the use of the derrick. The evi-

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dence was conflicting as to who was to keep the derrick in repair. Plaintiff claimed that defendant agreed so to do. Defendant's evidence tended to show that it agreed to make repairs when notified by Dillon that repairs were necessary. It did not appear but that the derrick was in good repair when furnished. Dillon employed plaintiff, with others, to assist him in the performance of his contract. The hook supporting the gaff or boom and tackle of the derrick became worn and broke when transferring a rail, and fell upon plaintiff, doing the injury complained of. The court charged the jury, among other things, "that it was the duty of the defendant, if there was no special agreement as to the inspection and keeping the derrick in order, to provide a suitable and proper derrick and keep it in order;" also, that if the agreement was that defendant was to make repairs when notified by Dillon that repairs were needed, and no notice was given, yet the defendant was liable if the agreement was not known to plaintiff and the accident occurred from neglect to repair, and without any negligence on the part of plaintiff." To which defendant's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

Matthew Hale for the appellant. Contributory negligence, where the facts are undisputed, becomes a question of law. (*Morrison* v. *Erie R. Co.*, 46 N. Y., 302; *Mitchell* v. *N. Y. C. and H. R. R. R. Co.*, 2 Hun, 535.) It was error to submit to the jury the question whether defendant was negligent in the construction of the derrick. (*McPadden* v. *N. Y. C. R. R. Co.*, 44 N. Y., 478; *Terry* v. *Mayor, etc., of N. Y.*, 8 Bosw., 504, 510.) Defendant was not liable for Dillon's negligence. (*Pack* v. *Mayor, etc.*, 4 Seld., 222; *Hofnagle* v. *N. Y. C. R. R. Co.*, 55 N. Y., 608, 612.)

Amasa J. Parker for the respondent. Plaintiff not being an employe of defendant, the negligence of the latter's employes was not that of co-employes. (2 Redf. on Railways [5th ed.], 527; *Young* v. *N. Y. C. R. R. Co.*, 30 Barb., 229;

Cincinnati v. *Stone*, 5 Ohio, 38; *Michael* v. *Stanton*, 5 T. & C., 634; *Blake* v. *Ferris*, 5 N. Y., 48.) Even if plaintiff had been an employe of defendant, the latter would be liable, as the injury was caused by the use of unsafe machinery. (2 Redf. on Railways [5th ed.], 544; *Keigner* v. *W. R. R. Co.*, 4 Seld., 175; *Laning* v. *N. Y. C. R. R. Co.*, 49 N. Y., 521.) As owner of the derrick, defendant owed a duty to every person lawfully near it. (*Coughtry* v. *Globe Woolen Co.*, 56 N. Y., 124, 126.)

ANDREWS, J. Where one person has sustained an injury from the negligence of another, he must, in general, proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant, while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief and hold the master responsible for the damages sustained. The master selects the servant, and the servant is subject to his control, and, in respect of the civil remedy, the act of the servant is, in law, regarded as that of the master. But it is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was at the time acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them.

If the person who was the immediate cause of the injury was a contractor, engaged in performing a contract to do a specific work as, for example, building a house, the relation of master and servant is not created by the contract between the parties, and for the contractor's negligence, while performing the work, the other party is not liable. (*Blake* v. *Ferris*, 1 Seld., 48; *Allen* v. *Haywood*, 7 A. & E. [N. S.], 974; *Laugher* v. *Pointer*, 5 B. & C., 547.) Unless the relation of master and servant exists, the law will not impute to one person the negligent act of another. It has sometimes been supposed

that the owner of real property is liable for any injury resulting from negligence, done in the progress of work going on for his benefit on his property, whether the person who was the negligent cause of the injury was his servant or not, and that there is a distinction in respect to the owner's liability, for the act of a contractor, depending on the fact whether the negligence was committed in the management or use of his real or chattel property. But this distinction, if it ever had any support in judicial authority, has been repudiated. (*Reedie* v. *The London and North-western Railway Co.*, 4 Exch., 244; *Hobbit* v. *Same*, 4 id., 253; *Pack* v. *The Mayor, etc.*, 8 N. Y., 222; *Kelly* v. *The Mayor*, 11 id., 432; *Blake* v. *Ferris, supra.*) In *Reedie* v. *London and North-western Railway Company* the plaintiff's intestate was killed by the falling of a stone, through the negligence of workmen engaged in constructing a viaduct on the defendant's railway, across a road upon which the deceased was passing at the time of the accident. The work was being done by contract, and the plaintiff relied upon the distinction adverted to, to take the case out of the ordinary rule, but the court held that the company was not liable. And in *Peck* v. *Mayor, etc.*, it was held that a city corporation was not liable for injuries to third persons occasioned by the negligence of workmen engaged in grading a street under the direction of a person who had entered into a contract with the corporation to perform the work.

The rule that a person who has entered into a contract for a specific work to be done by another is not liable for the act or conduct of the contractor, has no application in a case where the thing contracted to be done is unlawful, or where a public duty is imposed upon an officer or public body, and the officer or body charged with the duty commits its performance to another. For instance, whoever directs the doing of an act which, when done, will necessarily be the creation of a nuisance, will be personally responsible for a special injury resulting therefrom to third persons, whether the act is performed by a servant or contractor, and a municipal corporation, charged by statute with the duty to keep streets in

repair, cannot escape liability for a negligent performance of this duty, on the ground that the immediate negligence was that of a contractor who had been intrusted with its performance. (*Storrs* v. *The City of Utica*, 17 N. Y., 104; Addison on Torts, 197.)

In this case the liability of the defendant for the injury sustained by the plaintiff from the falling of the derrick cannot be maintained upon the ground that it was caused by the negligence of Dillon in omitting to keep the derrick in repair. The relation of master and servant did not exist between Dillon and the defendant. His relation to the company was that of contractor, exercising an independent employment. By his contract with the defendant, made in the spring of 1872, he undertook to unload from barges or vessels and place upon cars all the railroad iron brought to the dock in Albany for the defendant during the season of navigation in that year, for the price of six cents a bar, and the defendant was to furnish a derrick to be used by Dillon in hoisting the iron from the vessels in which it was brought. Dillon, for several years before, had a similar contract with the defendant. He employed laborers to assist him in performing the contract, and, among others, the plaintiff. These persons were employed and paid by him, and were not subject to the control of the defendant. The negligence of Dillon to inspect and repair the derrick, if he was chargeable with negligence for omitting to do so, was not the negligence of the defendant, and it is not responsible therefor. Dillon stood as the employer and master of the plaintiff, and, for his negligence, the plaintiff's remedy is against him alone.

If there was a duty resting upon the defendant to keep the derrick in repair, so that it could be safely used, it may be conceded that the omission of this duty would give a right of action to the plaintiff for an injury caused thereby. In the absence of a contract by the defendant with Dillon to keep the derrick in repair, I am unable to see any ground for inferring a duty on its part to do so. The defendant agreed with Dillon to furnish the derrick to enable him to perform his

contract to unload the iron. It performed its contract in this respect when it furnished a derrick suitable and safe, at the time, for use. That the derrick might from use become out of repair and unsafe was known to the defendant, but this was also known to Dillon, and those employed by him. The owners of an implement or piece of machinery may lawfully allow another to take and use it, and if, in using it, it becomes defective, and causes injury to a third person, is the owner responsible? I think not; especially where the article is not in its nature dangerous, and is placed in the possession of a person competent to manage and use it. This was substantially what was done by the defendant; and the fact that the right to use the derrick was given to Dillon by the coutract, and that it was to be used in performing work for the defendant, and on its premises (assuming that the dock belonged to the defendant), does not, I think, change the liability. The plaintiff knew that Dillon had taken the contract for unloading the iron, and the cases which hold it to be the duty of a master to furnish safe and suitable machinery for the use of his servants have no application, because that relation did not exist between the plaintiff and defendant.

In *Coughtry, Administrator*, v. *The Globe Woolen Company* (56 N. Y., 124) the defendant caused a scaffold to be erected fifty feet from the ground to accommodate workmen who should be engaged in putting a cornice on the defendant's building, and made a contract with Osborne & Martin to put on the cornice, and the scaffold, owing to its defective construction, fell while the plaintiff's intestate, a workman employed by the contractors, was upon it, and he was killed. This court reversed the nonsuit granted at the Circuit. The court say: "The scaffold was upward of fifty feet from the ground, and unless properly constructed would be a most dangerous trap, imperiling the life of any person who might go upon it; that by placing it where they did, on their own premises, for the use of the workmen, they (the defendants) not only licensed, but invited them to go upon it, and impliedly held out to them that it was a safe structure, or at least that proper care had been used in

its erection," and these facts, it was held, imposed a duty upon the defendants toward any person who should be invited to go upon the structure, to use proper care in its construction. (See, also, *Corby* v. *Hill*, 4 C. B. [N. S.], 556; *Chapman* v. *Rothwell*, El., Bl. & El., 168; *Hounsell* v. *Smyth*, 7 C. B. [N. S.], 738.)

In this case there was no holding out by the defendant to the plaintiff that the derrick was safe at the time of the accident, and no invitation on its part to the plaintiff to use it. The evidence tended to show that the contract between the defendant and Dillon contained some stipulation in respect to repairs of the derrick by the defendant. It is claimed by the plaintiff that the defendant agreed to keep it in repair, but the defendant's proof tended to show the agreement was that the defendant should make repairs when notified by Dillon that repairs were necessary. The court on the trial ruled substantially two propositions: First. That it was the duty of the defendant, if there was no special agreement as to the inspection and keeping the derrick in order, to provide a suitable and proper derrick, and to keep it in order. Second. That if the agreement was that the defendant was to make repairs when notified by Dillon that repairs were needed, and no notice was given, yet the defendant was liable if this agreement was not known to the plaintiff, and the accident occurred from neglect to repair, and without any negligence on the part of the plaintiff. The defendant excepted to the charge that the defendant was bound in the absence of a contract to do so, to keep the derrick in order, and also to the second proposition stated. Both exceptions were, I think, well taken. No duty, in the absence of a contract to repair, rested upon the defendant for the reasons before given, and if the plaintiff's right of action is founded upon negligence of a duty imposed by the contract between the defendant and Dillon to keep the derrick in repair, that duty did not arise if the contract was conditional until notice that repairs were needed was given.

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The judgment should be reversed and a new trial ordered.

All concur except CHURCH, Ch. J., not voting; ALLEN, J., not sitting. FOLGER, J., absent.

Judgment reversed.

JAMES ANDERSON, Respondent, *v.* HUGH REILLY, Appellant.

The legislature has authority to confer upon the Marine Court of the city of New York whatever civil or criminal jurisdiction it deems best, subject only to the restriction that its character as a local court shall be preserved. (Const., art. 6, § 19.)

It may confer jurisdiction in actions of assault and battery, without limit as to the amount of the claim or recovery.

The provision of the Marine Court act of 1872 (§ 8, sub. 12, chap. 629, Laws of 1872) providing that any court of record in the city and county of New York shall have power to send any action of assault and battery, etc., brought therein, to the Marine Court for trial, and giving the Marine Court jurisdiction of such action, as comprehensive as that of the court transferring it, although ineffectual to authorize a compulsory transfer, yet may have effect where the parties consent thereto, and the act may be read as if this condition were inserted.

Alexander v. *Bennett* (60 N. Y., 204) distinguished.

(Submitted April 18, 1876; decided May 23, 1876.)

APPEAL from order of the General Term of the Court of Common Pleas of the city and county of New York reversing an order of the General Term of the Marine Court which vacated and set aside a judgment in favor of the plaintiff herein, entered upon a verdict, and remitting the cause to said General Term of the Marine Court, to be heard upon the merits. The nature of the action and the facts appear sufficiently in the opinion.

The General Term of the Marine Court did not hear the case upon the merits, but made the order vacating and setting aside the judgment below, upon the ground that the Marine Court acquired no jurisdiction.

H. P. Townsend for the appellant. The Marine Court had no jurisdiction of the subject-matter of the action, and

none was obtained by the consent to its trial in that court. (*The Alicia*, 7 Wal., 57; *Major* v. *Cooper*, 6 id., 247.)

Geo. H. Yeaman for the respondent. The Marine Court acquired jurisdiction by statute, by consent and by voluntary appearance. (*De Hart* v. *Hatch*, 6 T. & C., 187; *Alexander* v. *Bennett*, id., 193; *Embury* v. *Conner*, 3 Comst., 508; *Baker* v. *Braman*, 6 Hill, 47.)

ANDREWS, J. This action was originally brought in the Supreme Court, in the city of New York, and, after issue joined, it was by an order of that court, made on the 10th day of May, 1873, upon the written consent of the parties, transferred to the Marine Court. The cause was tried in the Marine Court in September, 1874, and resulted in a verdict for the plaintiff. Both parties appeared on the trial, and no objection was taken, at any stage of the proceedings, prior to the entry of judgment, to the jurisdiction of the Marine Court The action was for an assault and battery. The plaintiff, in his complaint, asked judgment for $5,000; he obtained a judgment for $1,000. The parties were residents of the city of New York, where the cause of action arose.

The order of the Supreme Court transferring the cause was made in pursuance of section 3, subdivision 12 of chapter 629 of the Laws of 1872, known as the Marine Court act. That section provides that any court of record in the city and county of New York "shall have power, by an order to be entered by its direction on its minutes, to send any action for libel, slander, assault, battery, etc., pending or that may hereafter be brought in said courts of record, after issue has been joined therein, to the said Marine Court for trial * * * and, thereupon the said Marine Court of the city of New York shall have immediate and exclusive jurisdiction of such action, and the said jurisdiction of said court, as to the amount of the recovery, costs and additional allowance therein shall, for the purposes of such action, be the same, and as full and comprehensive as that of the court from whence the same proceeds.'

The cause was regularly remitted to the Marine Court under the act, and the trial and judgment had in conformity with it. The objection is now taken that the act, so far as it attempted to confer power on the other courts of record in the city of New York, to transfer causes pending therein to the Marine Court, is unconstitutional, and the case of *Alexander* v. *Bennett* (60 N. Y., 204), is relied upon in support of this proposition. The action in that case was commenced in the Superior Court of the city of New York. After issue was joined, the Superior Court, upon the motion of the plaintiff, which was opposed by the defendant, made an order sending the cause to the Marine Court. The removal in that case was made under the Marine Court act of 1874, which enlarged the provisions contained in the act of 1872, by striking out the specification of particular actions and authorizing the transfer to be made in all actions pending in the other courts of record in the city. This court, in that case, held that the provision of the Constitution (art. 6, § 12) continuing in the Superior Court of the city of New York, and certain other courts, the powers and jurisdiction which they had at the time of the adoption of the article, deprived the legislature of all power to take from the courts mentioned their then existing jurisdiction, and that the court could not refuse to exercise the jurisdiction which it then had whenever its exercise was invoked by litigants, or transfer it to another court against their consent. The act of 1874 was, therefore, held to be in violation of the Constitution, in so far as it undertook to invest the court with the power compulsorily, and against the will of the parties, to transfer to the Marine Court actions of which it had jurisdiction when the Constitution was adopted.

The question here presented is quite different; the parties consented to the transfer of the cause, and appeared and litigated the action upon the merits in the Marine Court. The Marine Court is a local court established by the legislature. It was competent for the legislature to confer upon it whatever civil or criminal jurisdiction it might deem best, subject only to the restriction that its character, as a local court,

should be preserved. (Const., art. 6, § 19.) The act of 1872 conferred jurisdiction upon the Marine Court in actions of assault and battery, where the damages claimed did not exceed $1,000; and, by the provision in question this jurisdiction was unlimited as to amount, in actions transferred from the other courts. The consent, therefore, of the parties is only material upon the question whether it justified the Supreme Court in making an order transferring the cause. If it did, then the statute, and not the appearance or consent of the parties, gave the Marine Court jurisdiction to try the action.

We are of opinion that the consent of the parties to the removal of the cause allowed the statute of 1872 to operate. The conferring of jurisdiction, in actions of assault and battery, upon the Marine Court, is not contrary to the letter or spirit of the Constitution. The legislature has conferred upon that court jurisdiction of such actions which is constantly exercised; limited, it is true, but this is a matter solely for legislative discretion. It could as well — so far as the question of power is concerned — have conferred the jurisdiction, without limit, as to the claim or amount of recovery. To give effect, therefore, to the consent of the parties, so as to allow the action to be tried in the Marine Court, is not contrary to the general policy of the law, and we do not perceive that it would violate any constitutional provision. The Constitution declares that there shall be the existing Supreme Court, with general jurisdiction in law and equity. (Const., art. 6, § 6.) The court is not deprived of its jurisdiction when, by its own order, it transfers a cause pending in it to another court, and the rights of litigants in that court are not abridged or impaired when they consent that another court shall try the cause. Parties may surrender or waive constitutional provisions designed for their benefit when civil rights, or rights of property, are involved. (*Baker* v. *Braman*, 6 Hill, 47; *Embury* v. *Conner*, 3 Comst., 511.) And we are of opinion that the act of 1872 may have effect upon the parties consenting to the order of the court transferring

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their causes to the Marine Court, and that the act may be read as if this condition was inserted.

The order appealed from should be affirmed.

All concur. FOLGER, J., absent.

Order affirmed.

GEORGE W. RIGGS et al., Respondents, *v.* JAMES PURSELL et al., MICHAEL GROSZ et al., Purchasers, Appellants.

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A purchaser at a mortgage foreclosure sale will not be relieved on account of apparent defects in the property, or of defects in the title of which he had notice, and in reference to which he made his bid.

Immaterial defects and merely technical objections will not defeat the sale. The court will not permit the purchaser to avoid his contract without seeing that the object of the purchase is defeated and that it would be injurious to him to enforce the contract. If he gets substantially what he contracted for, he must complete the purchase.

Where a mortgage is of a leasehold interest, and in the notice of sale under judgment of foreclosure the lease is referred to, a purchaser is chargeable with knowledge of the contents of the lease, and is supposed to have made his bid in view of its provisions.

A lease contained a covenant on the part of the lessee that he would not, during the term, assign, transfer or set over the lease or the term thereby created. A purchaser at a sale upon foreclosure of a mortgage given by the lessee upon the leasehold interest claimed that this covenant had been violated by giving the mortgage, and the lease thereby forfeited. It appeared that the lessors made no objection and were willing to assent if it was required. There was no proof that they had declared or claimed a forfeiture or that the purchaser had applied for their assent. They had received rents after the giving the mortgage with knowledge thereof. The mortgage was given two years before the sale, which was publicly advertised. *Held*, that under the circumstances there was no forfeiture.

It seems, that the giving of the mortgage was not a violation of the covenant, as it was not a transfer of the title or possession; nor was the foreclosure sale a breach, as it was a sale *in invitum*.

The lease contained a covenant that the lessee would, within two years from the commencement of the term, erect buildings on a portion of the demised premises worth at least $75,000, which was not done. This was known to the purchaser at the time of the purchase. The lessors, knowing the facts, had sued to recover rent without claiming for

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feiture, and it did not appear that they had ever claimed any forfeiture; it appeared by affidavits on part of plaintiffs that the purchasers were aware that the lessors were willing to extend the time, and had so extended it. *Held*, that no forfeiture on this account appeared; and that it did not defeat the sale.

Parties formerly owning the leased lands and other lands on both sides of Twenty-second street entered into an agreement that the buildings thereafter erected thereon, fronting on said street, should be placed back seven feet six inches from the street, so as to have a court-yard in front of the premises, and the houses had been built in conformity to the agreement, including one on that portion of the leasehold premises affected. There was no proof or allegation that this agreement diminished the value of the premises. *Held* (MILLER, J., dissenting), that while this agreement was in one sense an incumbrance upon the premises, it could not be assumed without proof that it injuriously affected their value; and as it was manifest that the purchasers would have bid the same had they known of the agreement, it was an immaterial defect, which the court would disregard.

In the said agreement was a covenant that the owners should not permit to be erected or carried on upon their respective premises any building or business generally classed as nuisances or dangerous or offensive. A similar covenant of the lessee was contained in the lease. *Held*, that the covenant in the agreement was for the benefit of all the lots, and it could not be inferred that it injured the value of any of them; and as essentially the same covenant was in the lease, this was no ground for relief.

(Argued April 15, 1876; decided May 23, 1876.)

APPEAL by Michael Grosz and Frederick H. Grosz, purchasers at a foreclosure sale herein, from an order of the General Term of the Supreme Court in the first judicial department affirming an order of Special Term requiring them to complete their purchase.

This action was brought to foreclose a mortgage executed by defendant, James Pursell, upon a leasehold interest in premises in the city of New York, at the south-easterly corner of Broadway and Twenty-second street.

The notice of sale and the terms of sale signed by the purchasers described the premises as leasehold premises, and referred to the lease, giving the parties, date and time and place of recording. The lease under which the mortgagor

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held was for twenty-one years from May 1, 1868; it contained covenants, on his part, that he would not, at any time during the time, "assign, transfer or set over this lease, or any of the term or time therein, unto any person or persons whomsoever, without the consent, in writing," of the lessors; that, on or before May 1, 1869, he, his heirs, etc., "would commence the erection of new buildings on said premises, to cost and be worth, at least, the sum of $75,000, and which shall be completed and finished within two years from the commencement of the demised term, and which shall cover the entire front on Broadway;" also, "that neither he nor they shall at any time hereafter, during the term hereby granted, erect, make, establish or carry on, or cause or suffer to be erected, made, established or carried on, in any manner, on any part of the said demised premises, any stable, school-house, municipal fire-engine house, tenement or community-house, or any kind of manufactory, or any trade or business generally classed as nuisances." It also appeared that, in 1849, an agreement, under seal, was made and entered into between Philip Kearney and Alexander S. Macomb and wife, who then owned all the lots on both sides of Twenty-second street, between Fourth avenue and Broadway, which stated that the parties, deeming it to be for their mutual advantage that the lots fronting on Twenty-second street should be used exclusively for dwelling-houses, and that the fronts of such dwelling-houses should be placed back seven feet six inches from the line of the street, and the parties, therefore, mutually agreed that so much of their respective lots as was "contained between the line of the streets and a line seven feet six inches therefrom shall forever hereafter remain and be enjoyed as a court-yard in front of any houses to be erected on said lots." The said agreement also contained this clause: "And the parties, for themselves and their respective heirs and assigns, mutually covenant and agree, to and with each other, that neither they nor their respective heirs or assigns shall or will erect or carry on, or permit to be erected or carried on, upon any part of their said

respective lots, any slaughter-house, smith's shop, furnace, steam engine, brass foundry, nail or other iron factory, or any manufactory of gunpowder, glue, varnish, vitriol, ink or turpentine, or for the tanning, dressing or preparing skins, hides or leather, or any brewery, distillery, or any other noxious or dangerous trade or business."

It appeared that, after the commencement of the term under the lease, an action was commenced against the lessors and the lessee, and an injunction obtained restraining the erection of a building upon any portion of the premises within seven feet six inches of the line of Twenty-second street, and, in consequence, the time for erecting the building provided for in the lease was extended.

The purchasers raised the following objections, among others, to the title:

"1. The mortgaged premises were, prior to the making of the mortgage mentioned in the judgment in this action, and still are, incumbered by reason of the provision contained in an agreement made between Philip Kearney and Alexander S. Macomb and wife, dated May 12, 1849, to the effect that so much of said premises as is contained between the southerly line of Twenty-second street and a line seven feet six inches therefrom, shall forever remain and be enjoyed as a court-yard in front of any houses to be erected on said premises.

"3. The lessee assigned, transferred and set over the said lease and term by making the mortgage, for the foreclosure of which this action was brought, without the consent of the lessors, in violation of the covenant and provision in that behalf contained in said lease, and thereby the said lease, and the estate of the lessee in and to the said premises, had been, prior to the sale, and were at that time, and now are, forfeited and lost.

"4. The lessee did not commence, nor did he finish or complete, new buildings on said premises, in accordance with his covenant in that behalf in said lease, nor has he commenced, finished or completed any new buildings on said premises in accordance therewith, and that thereby the said lease, and the

estate of the lessee in and to the said premises, had been, prior to the sale, and were at that time, and now are, forfeited and lost.

"5. The said premises are incumbered by reason of the covenant or provision contained in the said agreement between Philip Kearney and Alexander S. Macomb and wife, to the effect that there shall not be carried on upon any part of said premises any slaughter-house, smith's shop, furnace, steam engine, brass foundry, nail or other iron factory, or any manufactory of gunpowder, glue, varnish, vitriol, ink or turpentine, or for the tanning or dressing or preparing skins, hides or leather, or any brewery, distillery, or any other noxious or dangerous trade or business."

Further facts, pertinent to the objections, appear in the opinions.

Charles Jones for the appellants. The lease and the lessee's interest in the premises were forfeited by the mortgage which was executed without the written consent of any of the lessors, and the receipt of the rent, while ignorant of the forfeiture, was not a waiver of it, (*Jackson* v. *Bronson*, 7 J. R., 227, 234; *Clark* v. *Cumming*, 5 Barb., 339, 359; *Ireland* v. *Nichols*, 46 N. Y., 413; *Jackson* v. *Schutz*, 18 J. R., 174; *Bleecker* v. *Smith*, 13 Wend., 530.) The purchasers had a right to insist upon a good title. (*Seaman* v. *Hicks*, 8 Paige, 655; *Burwell* v. *Jackson*, 9 N. Y., 539; *Boyd* v. *Schlessinger*, 59 id., 301; *Veeder* v. *Fonda*, 3 Paige, 94; *Rogers* v. *McLean*, 10 Abb., 306). The title a purchaser is bound to accept must not only be good, but marketable. (Atkinson on Tit., 2, 369; 4 Law Lib. [N. S.], 1163; *Love* v. *Lent*, 14 Ves., 548; *Franklin* v. *Ld. Brownson*, id., 555; *Bklyn. Park Comrs.* v. *Armstrong*, 45 N. Y., 234.)

Jno. E. Parsons for the respondents. The purchasers having bought with full knowledge of the situation of the premises, cannot refuse, on account of the situation, to complete their purchase. (*Craddock* v. *Shirley*, 3 A. K. Marsh.

288; *Williamson* v. *Raney*, 1 Freem. Ch., 112; *Tompkins* v. *Hyatt*, 28 N. Y., 347; *White* v. *Seaver*, 25 Barb., 235; *Winne* v. *Reynolds*, 6 Paige, 407; *Kiny* v. *Bardeau*, 6 J. Ch., 38; *Banks* v. *Walker*, 3 Barb. Ch., 438; *Maxwell* v. *East River Bk.*, 3 Bosw., 124.) Notice to the purchaser of the lease was notice of its contents. (*Hall* v. *Smith*, 14 Ves., 426; *Taylor* v. *Stibbert*, 2 id., 437; *Daniels* v. *Derison*, 16 id., 249; *Smith* v. *Law*, 1 Atk., 489; *Allen* v. *Anthony*, 1 Morin, 262; *Chesterman* v. *Gardner*, 5 J. Ch., 29.) Knowledge sufficient to put upon inquiry is equivalent to a notice to a purchaser. (*I'itney* v. *Leonard*, 1 Paige, 461; *Pendleton* v. *Foy*, 2 id., 202; 1 Atk., 489; *Green* v. *Slayter*, 4 J. Ch., 38; *Darell* v. *Hally*, 1 Paige, 492; *Holbrook* v. *Wix*, 1 E. D. S., 154.) The purchasers had knowledge sufficient to put them upon inquiry as to the terms and conditions of the lease. (Sugd. on Vendors, 552; 4 Kent's Com., 172; 4 Sandf., 577; 8 N. Y., 277; 1 Story's Eq. Jur., § 398; 10 J. R., 461; 15 id., 568; 8 id., 137; 3 Ves., 478; *Williamson* v. *Brown*, 15 N. Y., 354; 2 Paige, 200; *Gilbert* v. *Peteler*, 38 N. Y., 165.)

EARL, J. A referee under a foreclosure decree made the sale in question. In making it he did not act as the agent of the parties, but as the officer of the court. The sale was theoretically made by the court through its officer, and the contract of the purchasers was with the court. The purchasers are entitled to all the property and title which the referee undertook to sell and which they rightfully supposed they were to receive. (*Morris* v. *Mowatt*, 2 Paige, 586; *Spring* v. *Sandford*, 7 id., 550; *Seaman* v. *Hicks*, 8 id., 655.) A purchaser upon such a sale will not be relieved on account of defects in the property or the title thereto, of which he had notice, and in reference to which he made his bid, and the court will not permit him to abandon his contract without seeing that the object of the purchase is defeated and that he would be injured by the enforcement of the contract. If every minute and critical objection to a judicial sale is suffered to prevail, it will be attended with much inconvenience and

embarrassment. A purchaser claiming to be discharged from his contract should, therefore, make out a fair and plain case for relief; and it is not every defect in the subject sold or variation from the description that will avail him. He will not be suffered to speculate at such sales, and, if he happens to make a bad bargain, to repudiate it and abandon his purchase on some nice but immaterial objection. If he gets substantially what he bargains for, he must complete the purchase and take his deed; and, in some cases, the court will compel him to take a compensation for any deficiency. The court will weigh the object and inducement of the purchaser, and, looking to the merits and substantial justice of each particular case, if the sale be fair, relieve or not from the purchase, according as the character of the transaction and circumstances may appear to require. (1 Barb. Ch. R., 534; *King* v. *Bardeau*, 6 Johns. Ch. R., 38; *Weems* v. *Brewer*, 2 Har. & Gill., 390.)

This was a sale of premises held under a lease, and the lease was referred to in the notice of sale, and hence the purchasers are chargeable with knowledge of the contents thereof. They are supposed to have examined the lease and made their bid in view of its provisions; and they are also chargeable with knowledge of what was apparent and obvious upon the premises. (*Taylor* v. *Stibbert*, 2 Ves., 437; *Hall* v. *Smith*, 14 id., 426; *King* v. *Bardeau*, *supra*; *Winne* v. *Reynolds*, 6 Paige, 407; *White* v. *Seaver*, 25 Barb., 235; *Tompkins* v. *Hyatt*, 28 N. Y., 347; *Craddock* v. *Thurley*, 3 A. K. Marsh., 288.)

The purchasers claim to be released from their purchase in this case upon several grounds, which I will consider separately, applying the principles above laid down.

1. The lease contained a covenant, on the part of the lessee, that he would not, during the term, assign, transfer or set over the lease or any of the term thereby created, and the purchasers claim that this covenant was violated and the lease forfeited by the giving of the mortgage which was foreclosed. Their objection is based upon the giving of the mortgage, not

that there was a forfeiture by the sale under the mortgage. There are several answers to this objection: in the first place, it is averred in the moving affidavit, on the part of the plaintiffs, that the purchasers were well aware that the lessees made no objection to the mortgage, on the ground that their assent was necessary, and that they were willing to give such assent if required. These allegations are not denied in any affidavit or proof, on the part of the purchasers, and hence they must be taken as true. There was no proof that the lessees had declared or claimed any forfeiture, or that they had in any way refused their assent to the mortgage, or that the purchasers have ever applied for such assent. Taking the facts that the mortgage was given and recorded more than two years before the sale, that it was foreclosed by a public proceeding in court, and that the sale under the mortgage was publicly advertised, that rent was paid after the giving of the mortgage and received by the lessors, their attorney receiving the same knowing of the mortgage, with all the other circumstances above alluded to, and it appears quite clearly that there was no forfeiture on the ground here considered. But there is a still further answer to this objection. The giving of the mortgage was not a violation of the covenant. A mortgage in this State of land is not a transfer of the legal title or the possession, but a mere security. (*Trimm* v. *Marsh*, 54 N. Y., 599.) It has been held in several cases in England that such a covenant is not violated by a delivery of the lease as a security for money loaned, and yet such a delivery operates as an equitable mortgage of the term created by the lease. (Taylor's Landlord and Tenant [2d ed.], 406; Platt on Leases, 258; *Doe* v. *Hogg*, 4 Dowl. & Ry., 226; *Doe* v. *Bevan*, 3 Maul. & Sel., 353,) In *Doe* v. *Hogg* there was a covenant "not to let, set, assign, transfer, set over or otherwise part with the premises demised in the lease" of a coffee-house. The lessee deposited the lease with a brewer as security for beer supplied to the house, and it was held that the covenant was not violated. ABBOTT, Ch. J., said: "I am clearly of opinion that the effect of the covenant is only to restrain the lessee

from completely alienating the legal interest in the premises to the prejudice of the landlord without his consent in writing." In *Doe* v. *Beavan* there was a similar covenant, and the lessee deposited his lease as a security for money borrowed, and became bankrupt, and the lease was sold under the direction of the chancellor to pay that debt, and it was held that the lease was not forfeited. It is, therefore, clear that this lease was not forfeited by the giving of the mortgage, which did not transfer the title to the premises or the lease. Neither was it forfeited by the sale under the decree. This was a judicial sale in a hostile proceeding, a sale *in invitum*, and such sales are held not to violate this covenant. An assignment either by the lessee or his executor which is not voluntary, but caused by operation of law, is not a breach of the covenant not to assign. Where a lessee who had so covenanted gave a warrant of attorney to confess a judgment on which the lease was taken in execution and sold, it was considered no breach of the covenant, all the proceedings being in good faith. (*Doe* v. *Carter*, 8 Term R., 57; see, also, *Jackson* v. *Corliss*, 7 Johns., 531; *Stephenson* v. *Silvernail*, 17 id., 278; *Smith* v. *Putnam*, 3 Pick., 221.) Such covenants are restraints which courts do not favor. They are construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them. (*Church* v. *Brown*, 15 Ves., 265; *Blencow* v. *Bugby*, 2 W. Black., 766; Taylor's L. & T., §§ 402, 403; 2 Platt on L., 250.) This covenant, therefore, furnishes no ground for the relief of the purchasers.

2. The lease was dated in March, 1868, and contains also a covenant that the lessors would, within two years from the commencement of the term, erect buildings worth at least $75,000 covering the Broadway front of the premises. It is objected by the purchasers that these buildings were not erected, and hence that the lease was forfeited. They knew that these buildings were not erected and made their bid with such knowledge. It appears that the lessee was for a time restrained from erecting the buildings by injunction and that the lessors had extended the time for their erection. It appears

also that the lessors, knowing that the buildings had not been erected, had commenced suits to recover the rent of the premises without claiming a forfeiture. It does not appear that on this account the lessors have ever claimed any forfeiture, and the moving affidavit on the part of the plaintiffs expressly alleges that the purchasers are "aware that the lessors are willing to extend the time for the erection of buildings under said lease so as to suit their convenience, and have so extended the same," and these allegations are nowhere denied. This sale was made by the court. No fraud is imputed, and the purchasers seeking relief from the purchase must make out a plain, fair case, showing that the lease was forfeited. They should have shown it in some way by calling the lessors as witnesses, or by proving facts more potent than remote inferences.

3. In 1849, Kearney and Macomb owning all the land on both sides of Twenty-second street, between Seventh avenue and Broadway made an agreement by which they covenanted, among other things, that the buildings fronting on Twenty-second street should be placed back seven feet and six inches from the street, so as to leave a court-yard in front of the houses. The premises leased were 102 feet on Broadway, and 122 feet on Twenty-second street. The lots fronting on Broadway were not affected by this agreement. But this was a lot twenty-six feet wide most distant from Broadway, which fronted on the street, and was, therefore, subject to the agreement. The purchasers claim that this court-yard agreement was unknown to them at the time of the sale, and on that account claim to be relieved from their purchase. There is no proof and no allegation even that this agreement diminishes the value of the premises. It was made not to impose a burden upon this lot, but to enhancce the value of all the lots on the street. While the agreement requires that a court-yard shall be left in front of this lot, for the benefit of the other lots on the street, it also requires that a court-yard shall be left in front of all the other lots for the benefit of this; and all the houses on the street have been built in conform-

ity to this agreement. While this agreement may in one sense be regarded as an incumbrance upon this lot, it cannot be assumed, without proof, that it injuriously affects its value to any extent whatever. Besides, before the sale, the lessee had erected upon this lot a large and valuable building, leaving the court-yard in front thereof with flagging and iron grating therein, through which light is let into the basement of the building; and the court-yard is excavated beneath the flagging and grating, and used in connection with the building. These facts were well known to the purchasers at the time of the sale, and they bid knowing the precise condition of the premises. The proof is quite strong, also, that they knew of the court-yard agreement. But I am of opinion that the objection should be overruled, because there is no proof that the court-yard agreement in any way diminished the value of the premises and because it is manifest that the purchasers would have bid the same if they had known of the agreement. It was, therefore, an immaterial defect in the title which the court should disregard. In this respect the case is one where the purchasers got all they bargained for.

4. The lease contains a covenant that the lessee shall not, during the term, permit to be "erected, made, established or carried on on the premises any stable, school-house, municipal fire-engine houses, tenement or community-houses, or any kind of manufactory, or any trade or business generally classed as nuisances or dangerous or offensive to the neighborhood," The purchasers are charged with knowlegde of this covenant and cannot therefore complain thereof. But they claim that they did not know of the Kearney and Macomb agreement above mentioned, which contains a covenant applying to the whole of both sides of Twenty-second street, that neither party would "permit to be erected or carried on, upon any part of their said respective lots, any slaughter-house, workshop, furnace, steam engine, brass foundry, nail or other iron foundry, or any manufactory of gun-powder, glue, varnish vitrol, ink or turpentine or for the tanning, dressing or preparing skins, hides or leather or any brewery, distillery or any other noxious

or dangerous trade or business." This covenant like the one above considered, was made for the benefit of all the lots on the street, and it cannot be inferred that it diminished the value of any of them. The covenant in the lease was doubtless made to carry out the covenant in the agreement, and both covenants, in all essential features, are substantially alike. Taking into consideration the location of the premises, there is certainly no material difference between the two covenants, and it is preposterous to suppose that a person at the sale, knowing of both covenants, would have made any difference in his bid, on account of the covenant now complained of. This objection, therefore, furnishes no ground for relief.

Having thus carefully considered all the grounds upon which the purchasers seek to be relieved from their purchase, we are of opinion that the order of the Supreme Court is right, and should be affirmed.

MILLER, J. (dissenting). The agreement between Kearney and Macomb and wife reserved a strip of land, seven feet and six inches in width, along the northerly side of the lots on Twenty-second street, "to remain and be enjoyed as a court-yard in front of any houses to be erected on said lots;" and, at the time of the sale, a perpetual injunction had been granted by the Supreme Court restraining the defendants, in the action brought, from excavating or building upon the same, or using it otherwise than as a court-yard.

It is insisted that this is an incumbrance upon the premises which justified the purchasers in refusing to take title. Conceding that the purchasers were obligated to take notice of the covenants in the lease, it does not necessarily follow that they were bound by the terms of the agreement in question, without notice of its contents. It is urged that they had knowledge, and there is evidence to show that the houses on Twenty-second street were constructed on the court-yard line. This circumstance may have been the subject of observation, but it does not prove that the purchasers had knowledge that the actual title to the land was not beyond the court-yard line,

and the extent of their knowledge is by no means certain or definite. There is also proof that one of the purchasers was employed in superintending the putting down of the grating in said court-yard, but this may have been done without actual knowledge of the real situation of this portion of the premises; nor does it necessarily follow because there was a court-yard that the same was not held under the lease, without any restriction or reservation. It is also shown that one of the parties stated that he knew all about the dispute in reference to the court-yard. This is positively denied; and as evidence of declarations are always to be regarded with great caution, it is by no means satisfactorily established that the purchasers had full and accurate knowledge of the character of the conditions referred to. A serious question is therefore presented, whether, under the circumstances, the purchasers were bound to accept a conveyance; and where no notice is given by the terms of the sale, or otherwise, to direct the attention of bidders upon a sale to a condition contained in another agreement, and there is no direct proof of knowledge of such a condition, I think it cannot be fairly insisted that the purchasers had knowledge of the nature, character and extent of such restriction, and that the proof does not sufficiently establish such fact. The General Term, without disposing of the question discussed, held that, as the judgment in the case of *Clark* v. *The New York Life Insurance and Trust Company* * had been reversed, this objection must fail.

The court were clearly in error as to the decision of the Court of Appeals, as that court reaffirmed the decision of the Special Term, which held that the restriction did apply to the lot on Twenty-second street, distant ninety-six feet and one inch from Broadway. This leaves some twenty-six feet subject to the restriction, and constitutes a serious objection to the title. It clearly comes within the rule laid down, that where real estate is sold under a decree of the court, it will not compel the purchaser to complete his purchase where he will not obtain such an interest as he had a right to suppose

*64 N. Y., 33.

Statement of case.

from the terms of the sale he was buying when the property was struck off. (*Seaman* v. *Hicks*, 8 Paige, 655.) This rule is applicable to a sale of leasehold premises as well as the sale of a fee, and the same right exists in both cases to demand a good title to the interest agreed to be sold. (*Burwell* v. *Jackson*, 9 N. Y., 535; *Boyd* v. *Schlesinger*, 59 id., 301.)

The existence of a court-yard, without the right to build thereon, is an incumbrance, or such a defect of title as justifies the purchaser in refusing to fulfil when he has no knowledge of that fact, and can obtain none by the inspection of the lease itself; and the case of *Banks* v. *Walker* (3 Barb. Ch., 438), cited by respondents' counsel, is not antagonistic to this view of the subject. The publication of the notice of sale, referring to the lease, did not bind the purchasers to look beyond this, nor furnish sufficient knowledge to put them upon inquiry as to an instrument outside of the lease, and for this reason they are entitled to be relieved from their bid at the sale.

Upon the ground stated, and without considering the other objections urged, my opinion is that the orders of the Special and General Term should be reversed, and an order entered granting the application of the purchasers, with costs, and denying the motion of plaintiffs, with costs.

All concur with EARL, J., except CHURCH, Ch. J., not voting, and MILLER, J., dissenting. FOLGER, J., absent.

Order affirmed.

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WILLIAM E. MARSTON, Appellant, *v.* GEORGE W. SWETT et al., Respondents.

In an action upon a contract required by the statute of frauds to be in writing it is not necessary to allege in the complaint that it is in writing. For the purposes of the complaint this will be presumed, and unless the contract is denied in the answer or alleged to be void because not in writing, the statute furnishes no defence.

A judgment record in a former action between the parties, although not pleaded in bar, is competent to prove a material fact at issue.

Statement of case.

Plaintiff and defendants being the joint owners of certain letters patent, which they believed to be valid, entered into an agreement that defendants should have the exclusive right to manufacture the patented article, they paying to plaintiff a specified sum as royalty on each article manufactured. In an action to recover the royalty, *held*, that the invalidity of the patent was not a defence for the time the defendants enjoyed the use of the patent unmolested under the license.

It seems, that, had there been no patent, and defendants had agreed to pay the sum stipulated in consideration that plaintiff, during a given period, would not engage in the manufacture, there would have been a sufficient consideration to uphold the agreement.

Marston v. *Swett* (4 Hun, 153) reversed.

Saxton v. *Dodge* (57 Barb., 84) and the authorities holding that the invalidity of a patent is a valid defence to an action to recover the purchase-price thereof, distinguished.

As to whether, when a void patent has been sold in good faith and the purchaser has enjoyed the monopoly unmolested during the whole time, and without liability to account to any one claiming a superior right, he could defend an action for the purchase-price, *quære*.

(Argued April 19, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 4 Hun, 153.)

The complaint in this action alleged, in substance, that prior to October 1, 1869, plaintiff and defendants were joint owners of a patented invention known as "Hawk's Auxiliary Air Chamber for stoves, heaters and furnaces," and on that day it was agreed between them that in consideration that plaintiff would not license others to use said invention but give defendants the exclusive right, they would manufacture stoves with the invention attached and pay plaintiff fifty cents for each stove, heater or furnace so manufactured and sold by them, and plaintiff claimed to recover the license fees due up to January, 1872.

Defendants' answer set up substantially the same agreement, with the exception that it was alleged that the agreement to pay was upon the express condition that plaintiff should execute and deliver to the defendants "an instrument in writing wherein such exclusive right to such invention

should be given and granted to these defendants," and it was averred that plaintiff had refused and neglected to comply with this condition. The answer further alleged that the patent was illegal and void, and therefore there was no consideration for the agreement. It also set up a counter-claim for goods sold, etc., to the amount of $1,208.49.

Before the introduction of evidence upon the trial defendants' counsel moved to dismiss the complaint upon the grounds that the contract alleged in the complaint was without consideration, and that the contract was void within the statute of frauds, as it was not to be performed within a year, and as it was not alleged in complaint to be in writing, which motion was denied, and defendants' counsel excepted.

Upon the trial defendants offered in evidence a decree in an action brought by defendants against plaintiff and others in the United States Circuit Court for the northern district of New York, declaring the said letters patent were "void, invalid and of no effect." This was objected to, on the ground that said judgment was not set up in the answer. The objection was overruled, and plaintiff's counsel excepted.

The court refused permission to the plaintiff to go to the jury upon the facts, and directed a verdict in favor of defendants for the amount of the counter-claim, to which plaintiff's counsel duly excepted. A verdict was rendered accordingly.

James Lansing for the appellant. It was not necessary that the complaint should allege affirmatively that the contract was in writing. (*Livingston* v. *Smith*, 14 How., 492.) The agreement having been admitted by a failure to deny, no evidence to prove its existence was necessary. (*West* v. *Am. Ex. Bk.*, 44 Barb., 178.) The invalidity of a patent is no defence to an action like the present. (*Taylor* v. *Hare*, 1 N. R., 260; *Lawes* v. *Purser*, 88 E. C. L., 930; *Hall* v. *Conder*, 89 id., 20, 39, 40; *Smith* v. *Neal*, id., 67; *Norton* v. *Brooks*, 7 H. & N., 499; *Baird* v. *Neilson*, 8 Ct. & F., 726; *Crosby* v. *Dixon*, 10 H. of L. Cas., 293; *Kintrea* v. *Preston*, 1 H. & N., 357; *Thomas* v. *Barlow*, 48 N. Y., 193; *Otis* v. *Cullum*, 2 N. Y. W. Dig., 58; *Longridge* v. *Dorville*, 7

E. C. L., 74; *Haight* v. *Brooks*, 37 id., 180; *Kinman* v. *Packhurst*, 16 How. [U. S.], 289; *Bartlett* v. *Holbrook*, 1 Gray, 214; *McMahon* v. *Tyng*, 14 Al., 167; *Marsh* v. *Dodge*, 4 Hun, 278.)

Esek Cowen for the respondents. The answer substantially denied that the contract set forth in the complaint was in writing. (*Champlain* v. *Parish*, 11 Paige, 408; *Harris* v. *Kinckerbacker*, 6 Wend., 638.) The contract not being in writing was void, within the statute of frauds. (*Doyle* v. *Dixon*, 97 Mass., 208; *Lockwood* v. *Barnes*, 3 Hill, 128; *Bartlett* v. *Wheeler*, 44 Barb., 162; *Gaylor* v. *Wilder*, 10 How. [U. S.], 477; *Potter* v. *Holland*, 4 Blatch., 206; *Gibson* v. *Cook*, 2 id., 148.) Defendants' promise to pay royalties, being without consideration, cannot be enforced. (*Cross* v. *Huntley*, 13 Wend., 385; *Head* v. *Stevens*, 19 id., 411; *McDougal* v. *Fogg*, 2 Bosw., 387; *Saxton* v. *Dodge*, 57 Barb., 84, 114; *Dickson* v. *Hall*, 14 Pick., 220; *Earl* v. *Page*, 6 N. H., 480; *Davis* v. *Bell*, 8 id., 503; *Dunbar* v. *Marden*, 13 id., 316; *Geiger* v. *Cook*, 3 W. & S., 270; *Durst* v. *Brockway*, 11 Ohio, 471; *Fallis* v. *Griffith*, Wright, 303; *Mulliken* v. *Latchem*, 7 Blackf., 138; *McClure* v. *Jeffrey*, 8 Ind., 82; *Clum* v. *Brewer*, 2 Curtis, 524.)

EARL, J. It is claimed by the defendants that the contract sued on is void under the statute of frauds, as it was not to be performed within a year and was not in writing. A contract, valid in form, is set out in the complaint, and it does not there appear that it was not in writing. It was not necessary to allege that it was in writing. For the purposes of the complaint that will be presumed. If the contract alleged in the complaint had been denied, or the statute of frauds had been set up as a defence, then it would have been necessary upon the trial to prove that the contract was in writing, if it was one which the statute required to be in writing. (Moak's Van Santford's Pl., 203, and cases cited.) There is no denial of the contract in the answer, and no averment that it was void

because not in writing. The same contract, valid in form, is set up in the answer, and there it is averred that the amount agreed to be paid to the plaintiff by such valid contract was upon the "express condition that the plaintiff should execute and deliver to these defendants an instrument in writing wherein such exclusive right to such invention should be given and granted to these defendants," and that the plaintiff had refused to deliver the instrument in writing. It is not averred that the condition was that the contract was to be reduced to writing, but that a separate instrument, not embracing all the terms of the contract, but granting the exclusive right to use the invention, should be executed and delivered to the defendants. This averment is not inconsistent with the existence of a contract, in writing, embracing all the terms of the contract; and, if merely inconsistent, the contract alleged in the complaint not being denied, it would not answer the purposes of a general or specific denial of the contract alleged. (Code, §§ 149, 168; *Wood* v. *Whiting*, 21 Barb., 190; *West* v. *American Exchange Bk.*, 44 id., 175.) Hence, it may be assumed that the statute of frauds furnishes no defence to the action in its present condition.

It is also claimed, on the part of the defendants, that this contract is required to be in writing by section 11 of the patent law, passed by Congress July 4, 1836. This defence is not set up in the answer, and, for reasons above stated, the contract must be assumed to have been in writing and the law thus complied with.

It must not be inferred, from any thing here said, that we are of opinion that either the statute of frauds or the act of congress required this contract to be in writing. It will be time enough to determine whether they do or not when the questions are properly presented.

It is claimed by the defendants that the agreement is void for want of a consideration, in that the patent was invalid. This defence is very imperfectly set up in the answer, but the pleader evidently intended to set it up, and, therefore, we will assume that it is sufficiently pleaded. It is sufficiently

established by the judgment in the United States Circuit Court, in an action in which these defendants were plaintiffs, and this plaintiff and others defendants. That judgment established the fact that this patent was wholly void, invalid and of no effect, for the reason that Elizabeth Hawks, the patentee, was not the original and first inventor of the improvement patented. That judgment was not set up in the answer, but the invalidity of the patent was alleged, and the judgment was, therefore, properly received in evidence to prove the allegation, assuming that the allegation itself was material. (*Bouchaud* v. *Dias*, 3 Den., 238; *Castle* v. *Noyes*, 14 N. Y., 329; *Rinchey* v. *Stryker*, 28 id., 45.) The judgment in such a case is received in evidence, not as a bar of itself to a recovery, but as proof to establish a material fact in controversy. The invalidity of the patent being thus established, the further material point to be considered is, whether that furnished a defence to this action. I am of opinion that, upon the facts of this case, it did not.

The plaintiff and defendants were tenants in common of the patent, all believing it to be valid. Each had the right to manufacture and to license others to manufacture under it. (*Clum* v. *Brewer*, 2 Curtis, 506.) The defendants desired the exclusive right to use the invention, and hence made this agreement with the plaintiff. Under it, they actually enjoyed the exclusive right which they sought, and the plaintiff gave up all right to manufacture or to license others to manufacture. There was no fraud, and the defendants got all they bargained for. During the time mentioned in the complaint, they enjoyed all they could have had if the patent had been valid. Under such circumstances, there was abundant consideration to uphold the agreement, whether the patent was valid or invalid.

The parties held a patent, which was respected as valid by everybody. They enjoyed a monopoly of the invention. They could manufacture the patented article without competition; and the possession of the patent, apparently valid, enabled them to license others, for a consideration, to use

it. In consideration of defendants' promise, the plaintiff gave up all the advantage he thus had, and the defendants, by virtue of the agreement, enjoyed the exclusive monopoly. Here there was injury to one party, and benefit to the other, either of which is sufficient to furnish a consideration for a promise. (*Miller* v. *Drake*, 1 Cai., 45; *Converse* v. *Kellogg*, 7 Barb., 590; *Freeman* v. *Freeman*, 43 N. Y., 34.) Suppose there had been no patent whatever, and the defendants had promised the plaintiff to pay him fifty cents upon every stove which they manufactured, in consideration that he would not, during a given period, manufacture any? The plaintiff having the right to manufacture, and having abstained from its exercise, would any one question that there would be a sufficient consideration to uphold this promise of the defendants?

There are several English cases holding that the invalidity of the patent is no defence to such an action as this to recover license fees for the term the patent was actually used under the license. (*Taylor* v. *Hare*, 1 N. Rep., 260; *Lawes* v. *Purser*, 88 Eng. C. L. R., 929; *Noton* v. *Brooks*, 7 Hurlst. & N., 499; *Baird* v. *Neilson*, 8 Cl. & Fin., 726; *Crosley* v. *Dixon*, 10 H. Lords Cases, 293; *Chanter* v. *Dewhurst*, 12 M. & W., 823; *Lawes* v. *Purser*, 38 Law & Eq. R., 48; see also Hindmarch on Patents, 245.) To the same effect is *Bartlett* v. *Holbrook* (1 Gray, 114), and also *Marsh* v. *Dodge* (4 Kern., 279). The case of *Saxton* v. *Dodge* (57 Barb., 84) has some features like this case, but many more unlike it. There the licensees of the patent did not get all they bargained for, and they were induced to enter into the contract by fraud.

It is the settled law of this and several other States that the invalidity of the patent is a defence to an action for the purchase-price of the same, on the ground of a failure of the consideration. (*Cross* v. *Huntly*, 13 Wend., 385; *Head* v. *Stevens*, 19 id., 411; *McDougall* v. *Fogg*, 2 Bosw., 387; *Dunbar* v. *Marden*, 13 N. H., 317; *Geiger* v. *Cook*, 3 Watts & Serg., 270; *Darst* v. *Brockway*, 11 Ohio, 471; *McClure* v. *Jeffrey*, 8 Ind., 82; *Mullikin* v. *Latchem*, 7 Blackf., 136.)

It is therefore argued on behalf of the defendants that such an agreement as this, for the exclusive use of a void patent, which is a less interest than an assignment of the entire patent, is without consideration. This conclusion is not altogether legitimate. Where one bargains for a patent right he expects a monopoly, and something which he can use, sell and deal in during the entire term of the patent, to the exclusion of every one else. He bargains for something which he does not get, and cannot enjoy, if the patent is invalid. He gets nothing, the vendee parts with nothing, and there is an entire failure of consideration. But where one has a void patent which he can use, and give others the right to use, and thus has an advantage which is valuable to him, and another bargains for that advantage which he surrenders and the other enjoys, the latter, during the time he is permitted to use the patent unmolested, gets just what he bargained for, and cannot complain. When a case shall be presented where, in good faith, a void patent has been sold, and the vendee has enjoyed the monopoly for the whole term of the patent, without molestation or liability to account to any one claiming a superior right, it will be proper to consider whether, upon principle, there has been a failure of consideration, and whether such a case should be controlled by the authorities above cited. There is no doubt as to what would be decided by the English courts in such a case. (*Hall* v. *Conder*, 89 Eng. C. L. R., 22.) In this case the defendants had enjoyed the monopoly which they bargained for, without liability to account to any one except the plaintiff. They are not liable to account to the owners of the Lordfellow patent for the term prior to its issue. (*Gayler* v. *Wilder*, 10 How. [U. S.], 477.)

The plaintiff's claim was therefore undefended, and the court erred in ordering judgment for defendants upon their counter-claim. It is true that the counter-claim was not sufficiently denied by the reply, and judgment might have been ordered for the plaintiff for the balance of his claim, after deducting the amount of the counter-claim; but a new trial should be granted, and it is hoped that the very

imperfect pleadings will be so reformed before another trial as to present truly the precise issues which the parties desire to try.

Judgment should be reversed and new trial granted, costs to abide event.

All concur. FOLGER, J., absent.

Judgment reversed.

THOMAS BROWN, Respondent, *v.* OLIVER H. P. CHAMPLIN, et al., Appellants.

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It is not necessary to set forth in a pleading the circumstances attending a transaction, contract, or instrument in writing, counted on; it is sufficient to charge the legal effect thereof.

Plaintiff's complaint contained two counts; the first alleged the making and delivery by defendants of their bond conditioned to pay B. and Y. $5,000, and an assignment, for value, by the obligees to plaintiff; the second alleged that defendants covenanted, under their hands and seals, to pay B. and Y. $4,000, who assigned the covenant, for value, to plaintiff. It appeared that defendants and B. and Y. were stockholders in a company, and agreed with plaintiff for a loan to the company of $4,000, to be secured by a mortgage of its real estate, and by the bond of defendants, under which agreement the bond described in complaint was given. *Held*, that it was not necessary to aver the facts under which the bond was given, and that the evidence established the causes of action set forth in the complaint.

The contract was claimed to be usurious; first, because the bond was conditioned to pay $5,000, when but $4,000 was loaned; second, that for $2,000 of the loan plaintiff gave his notes for twenty and thirty days, without interest. In the assignment of the bond it was stated that it was to secure the payment of $4,000, and it was intended and treated by the parties as a security for that sum only. The giving of the notes was not found to have been done with intent to secure more than lawful interest. *Held*, that, for the purpose of sustaining the judgment, a finding that there was no such intent might be implied, and that the circumstances did not constitute usury in law.

It appeared that defendants refused to consent to the delivery of the bond to the plaintiff unless B. and Y. would agree to become equally liable with them for the payment of the money loaned. B. and Y. therefore indorsed on the bond the following: "For value received, we become jointly liable, in all respects, with the original makers of the within

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bond." This was not under seal. Plaintiff had no connection with or knowledge of this transaction. Defendants claimed a defect of parties, in that B. and Y. were not made parties. *Held*, untenable; that the form of the undertaking signed by B. and Y. was not apt and proper to constitute them joint obligees; that the fair inference therefrom was, that it was simply to secure to defendants the right of contribution against B. and Y.; that if plaintiff could maintain an action thereon, the instrument must be treated as a guarantee.

Defendants offered to show on trial, by B. and Y., that they intended, by signing the indorsement, to adopt the seals of the obligors; this was objected to, and objection sustained. *Held*, no error; that the intent was immaterial, as the question whether they did adopt the seals depended upon what they did and said, not what they intended.

(Argued April 21, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

The complaint in this action contained two counts; the first alleged, in substance, that, on or about June 17, 1869, defendants executed, under their hands and seals, and delivered to Frederick W. Breed and Charles E. Young a bond in the penal sum of $10,000, conditioned for the payment of $5,000 on or before August fifteenth, then next. That said Breed and Young, for a valuable consideration, sold and assigned the said bond to plaintiff, and alleged a balance due thereon. The second count alleged that defendants covenanted with Breed and Young, under their hands and seals, to pay said Breed and Young $4,000, with interest, on or before August sixteenth, thereafter; and that said covenantees, for a valuable consideration, sold and assigned the covenant to plaintiff. Defendants, in their answer, set up, among other things, a non-joinder of parties defendant, in that any bond or obligation made by them was made jointly with said Breed and Young. They also pleaded usury, in substance, that it was usuriously agreed that for a loan of $4,000 a bond of $5,000 was to be, and was, given; and that, for the sum loaned, plaintiff gave his check for $2,000, a note of twenty days for $1,000, and one at thirty days for $1,000, both without interest, which

were corruptly and usuriously agreed to be taken instead of money.

The court found, in substance, the following, among other things:

That on the 15th day of June, 1869, the defendants, together with Frederick W. Breed and Charles E. Young, were members of, and shareholders in, a joint stock association called the Buffalo and North Carolina Gold Mining Company. About the first day of July, in the year 1869, the defendants and said Breed and Young applied to the plaintiff for a loan of money to said joint stock association, and thereupon it was agreed that said plaintiff should loan the sum of $4,000, to be repaid him at the end of one year from August 1, 1869, with interest at the rate of seven per cent per annum, to be paid semi-annually in gold; but that plaintiff might at his option require the payment of the principal of the loan and the interest at the end of six months by giving thirty days' notice requiring such payment previous to the expiration of said six months, and that to secure such payment the said joint stock association should execute a mortgage, and the defendants should execute their bond to the plaintiff. In pursuance of this agreement, and to carry it into effect, the defendants made and executed, under their hands and seals, and delivered to said Breed and Young the bond described in the complaint in this action, and said Breed and Young executed, under their hands and seals, an assignment thereof to plaintiff, and also of a mortgage, which was described in said assignment as bearing date June 15, 1869, and made by Seth Clark, as president, and Oliver H. P. Champlin, secretary and treasurer of the Buffalo and North Carolina Gold Mining Company, and covering certain lands and property in the county of Cabarrus and State of North Carolina, and as made to secure the payment of said bond. The assignment also recited that it was made to secure the payment of the sum of $4,000, at the end of one year from the first day of August, 1869, with interest thereon at seven per cent in gold semi-annually, but that said plaintiff might, at his option, require the payment of the principal and interest at

the end of six months by giving thirty days' notice previous to the expiration of said six months. The said bond and assignment were delivered to the plaintiff on the 29th day of July, 1869, and at the same time the plaintiff paid to the said defendant Champlin, as secretary and treasurer of said joint stock association, the sum of $2,000 as part of said loan, and for the remainder thereof the plaintiff made and delivered to said Champlin two promissory notes, each dated July 20, 1869, each for the sum of $1,000, each made by said plaintiff and payable to the order of said Champlin, one of them being payable twenty days after its date, and the other thirty days after its date, and neither of them bearing interest. The plaintiff paid each of said notes at maturity. The mortgage described in the assignment was executed, but was never delivered to the plaintiff, having always remained in the possession of defendant Champlin. After the bond was executed, and before it was delivered to the plaintiff, the defendants refused to consent to its delivery to the plaintiff unless the said Breed and Young would agree to become equally liable with the defendants for the payment of the money, and thereupon, and at the request of the defendants, the said Breed and Young indorsed on the back of the bond, and signed an instrument in these words, viz.: "For value received we become jointly liable in all respects with the original makers of the within bond," and the bond so indorsed was delivered to plaintiff.

As conclusion of law, the court found defendants liable for the amount unpaid.

Upon the trial Breed and Young were called as witnesses for the defendants, and they offered to prove by them that by signing the agreement on the back of the bond each intended to adopt as his seal the seals of those who had signed the bond. This was objected to and objection sustained. Defendants' counsel duly excepted.

James A. Allen for the appellants. The recovery in this action cannot stand, because it was based on a cause of action

distinct and different in its legal nature and substance from the cause or causes of action set forth in the complaint. (*Barnes* v. *Quigley*, 59 N. Y., 268; *Wright* v. *Delafield*, 25 id., 266; *Ross* v. *Mather*, 51 id., 108; *Scofield* v. *Whitelegge*, 49 id., 259; *Lewis* v. *Mott*, 36 id., 395; *Decker* v. *Satsman*, 1 Hun, 426; *Beard* v. *Yates*, 2 id., 467; *Seward* v. *Torrence*, 5 T. & C., 325; *Gasper* v. *Adams*, 28 Barb., 441; *Whitaker* v. *Merrill*, 30 id., 391; *Tolans* v. *Nat. S. Nav. Co.*, 35 How., 49; *Un. Bk.* v. *Mott*, 18 id., 506; *Foster* v. *Goddard*, 1 Black., 518; *Simmes* v. *Guthrie*, 9 Cranch, 319; *Trip* v. *Vincent*, 3 Barb. Ch., 613; *Harrison* v. *Nixon*, 9 Pet., 483; *Bank* v. *Shutty*, 3 Ohio, 61; *Saddler* v. *Grover*, 5 Dana, 552; *Breckenridge* v. *Ormsby*, 1 J. J. Marsh., 237–264.) The bond executed by defendants was usurious and void. (*Fielder* v. *Darrin*, 50 N. Y., 443; *Tyng* v. *Com. W. Co.*, 58 id., 308; *Eagleson* v. *Shotwell*, 1 J. Ch., 536; *Mer. Ex. Nat. Bk.* v. *Com. W. Co.*, 49 N. Y., 641; *Un. Nat. Bk. of P.* v. *Wheeler*, 60 id., 612; *Rosa* v. *Butterfield*, 33 id., 665.)

J. M. Humphrey for the respondent. There was no variance between the cause of action alleged in the complaint and that proved. (Code, §§ 169, 171, 176.) The consideration for the assignment of the bond to plaintiff was not usurious. (Laws 1850, chap. 172, p. 334; *Rosa* v. *Butterfield*, 33 N. Y., 665; Tyler on Usury, 151.)

CHURCH, Ch., J. The learned counsel for the defendants asks for a reversal of the judgment in this action, upon three grounds. 1. That the recovery was for a different cause of action from that set forth in the complaint. 2. For usury. 3. For defect of parties defendant.

The first ground is clealy untenable. The complaint contains two counts; the first alleges the making and delivery by defendants of a bond in the penal sum of $10,000, conditioned to pay Breed and Young $5,000, and an assignment for value by the latter to plaintiff. The second count alleges, that the defendants covenanted under their hands and seals, to pay

Breed and Young $4,000, which covenant was assigned by the latter to plaintiff for value. The recovery was substantially for the cause of action set forth, although some of the circumstances as proved and found attending it were not averred. It is found that the defendants and Breed and Young were stockholders in a North Carolina gold mining company, and agreed with the plaintiff for a loan to the company of $4,000, to be secured by a mortgage of the company upon its real estate in North Carolina, and the bond of the defendants. The omission to state the relation of the parties to the company, and the application for the loan, or that Breed and Young were nominal obligees only, or all the terms of the assignment, or that the loan was made to the company did not make a failure of proof of the cause of action set up in the complaint, nor a substantial variance, and certainly not one which could have misled the defendants. It is unnecessary to set forth the evidence or the circumstances attending the transaction. It is sufficient to charge the legal effect of a transaction, contract or instrument in writing.

The defence of usury is predicated, first, upon the fact that the bond was conditioned to pay $5,000, when only $4,000 was loaned upon it; second, that interest was payable in gold; and third, that for $2,000 of the $4,000 loaned the plaintiff gave his notes for twenty and thirty days, without interest. The bond, although in form for $5,000, was assigned in terms to secure $4,000, and was a security in the hands of the plaintiff for only $4,000, and was so intended by the parties, and has been so treated since by them in the payment of interest and principal. The circumstance that the interest was payable in gold is not set up in the answer as a fact constituting usury, and need not, therefore, be considered. The giving of the notes for twenty and thirty days, without interest, for a portion of the loan, is not found to have been done in pursuance of a usurious agreement, or with the intent to receive or secure more than the lawful rate of interest, and we may imply, for the purpose of upholding the judgment, a finding that there was no such intent. The only question, then, is,

whether that circumstance constitutes usury in law. I think, very clearly, that it does not. It may have been done, and from the evidence was done, for the convenience of the defendants. The plaintiff had but $2,000 in money at the time, but said he would have it in a few days, and the notes were given at the defendants' request. The evidence repels the idea that this was resorted to to secure more than seven per cent. The defendants might have required the plaintiff to have made an allowance for the interest upon the $2,000, until it was advanced, but the defence of usury cannot be established, as a question of law, upon such a trivial and usual occurrence, and one so clearly capable of an innocent construction. The third ground, a defect of parties, has more plausibility. It is found that the defendants refused to deliver the bond to the plaintiff, unless Breed and Young would agree to become equally liable with them for the payment of the money which the plaintiff had agreed to loan to the company, and that, at their request, Breed and Young thereupon indorsed on the back of the bond the following: "For value received we become jointly liable, in all respects, with the original makers of the within bond." This instrument was not under seal. The learned judge who tried the action must have inferred that this was an arrangement for the benefit of the defendants to secure to them the right of contribution against Breed and Young, in case of payment by them, and we think this inference was fully warranted by the evidence. The plaintiff had no connection with, or knowledge of, this transaction. He loaned the money upon the defendants' personal responsibility, and neither required nor cared for Breed and Young's obligation. The defendants exacted it. Breed and Young were obligees named in the bond, and could not be obligors at the same time; nor did the defendants require that they should be, nor was the form of their undertaking apt and proper to constitute them joint obligors. If their agreement was with the defendants, the plaintiff could not have maintained an action upon it, but, if he could, it must have been separate from the action against the defend-

ants. If it had been intended to make them joint obligors in the bond, a different form would have been adopted. If the plaintiff could have maintained an action upon it at all, the instrument must have been treated as a guaranty. The defendants will not be substantially injured because Breed and Young are unquestionably liable to contribute to them for their proportion of any amount which they will be obliged to pay, and they will also be subrogated to the rights of the plaintiff in the mortgage executed by the company. In equity the plaintiff was entitled to the mortgage, and Champlin would be deemed to hold it for his benefit. The objection of a defect in parties is, in this case, somewhat technical, and, as the transaction is capable of a construction which obviates it, that construction should be given to it.

The objection to the question to Breed and Young, whether they intended, by signing the indorsement, to adopt the seals of the obligors, was properly sustained. The question upon this part of the case was whether they did adopt the seals, and that depended upon what they did and said and not upon any mental emotion, and, if they did adopt them, their intent was immaterial. The rule of allowing a person to testify to an intent has never been carried to such an extent. That rule applies when the intent with which an act is done is the material point in issue, as the assignment of property with intent to defraud creditors, assault with intent to kill, and the like.

The judgment must be affirmed.

All concur. FOLGER, J., absent.

Judgment affirmed.

THOMAS T. CHURCH, Appellant, v. THE LA FAYETTE FIRE INSURANCE COMPANY OF BROOKLYN, Respondent.

In an action upon an alleged contract of fire insurance, plaintiff's evidence tended to show that he had insured with defendant for many years, and had been in the habit of getting policies without paying premiums at the time. That plaintiff called upon defendant's secretary September 6, 1871, in reference to insurance upon a hotel on which defendant then had a policy, and endeavored to get it insured at a less rate. The agent answered that he would insure it at the old rate, no less. To which plaintiff replied, "very well, I must have it insured." The defendant made out a policy the next day, dating it the sixth. On the ninth, plaintiff called and asked the secretary if he had taken the building. That officer replied that he had, at the old price. On October sixteenth, plaintiff again called to get insurance on other property, and told a clerk of defendant's (the secretary not being in) that he had another policy, and would pay for both together. The clerk replied, "very well." The hotel was burned November seventh. Plaintiff called the next day, informed the secretary of the loss, and offered to pay for the two policies, but the secretary refused to accept payment for the policy in suit, claiming defendant not to be liable, because the house was vacant. A few days thereafter, plaintiff paid the premium on the second policy from its date, which was accepted. The policy in suit contained a clause that the company would not be liable until the premium was paid. *Held*, that the evidence was sufficient to require the submission to the jury of the question whether a credit was not intended to be given, and this condition waived; and that a nonsuit was error.

(Argued April 25, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the City Court of Brooklyn affirming a judgment in favor of defendant, entered upon an order nonsuiting plaintiff upon trial.

This action was upon an alleged contract of fire insurance. Plaintiff's evidence was in substance that he was the owner of a hotel at Coney Island which for three years successively, prior to September 6, 1871, had been insured by defendant. Plaintiff had dealt with defendant a good many years, and he testified that he had been in the habit of getting policies without paying for them; that he

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never paid for a policy at the time. On the day specified he called at defendant's office, for the purpose of getting the hotel insured for the coming year, when he saw Mr. Hunt, defendant's secretary, whom he tried to pursuade to insure it at a less rate, but that Hunt told him he could not take it at any less; that he would take it at the old rate, but no less, to which plaintiff replied, "very well I must have it insured," and left. On the seventh a policy was made out, insuring the property from the sixth. It contained the usual clause. "This company shall not be liable by virtue of this policy or any renewal thereof, until the premium thereof be actually paid." It was the custom of defendant to register policies as issued and this policy was regularly entered in the policy register, as a one-year policy, expiring September 6, 1872. On the ninth plaintiff called and asked Hunt if he had taken the hotel. He replied, "yes, I have taken it at the old price." On the sixteenth October, plaintiff called at defendant's office, to get some insurance upon other property owned by him. Hunt was not in, he left a memorandum with the clerk, saying: "I have another policy and I will pay for the two together." The clerk replied, "very well." The other policy was made out. On the 7th of November, 1871, the hotel was burned, on the eighth, plaintiff called and asked Mr. Hunt for the two policies, which he produced, plaintiff told him the hotel was burned the night before, Hunt took the policy, examined it, asked if the place was occupied, plaintiff replied "no," Hunt then said, "well, then, we are not liable," and he indorsed upon the policy, "notified of the premises being vacant and also of its being burned, G. W. Hunt secretary." Plaintiff offered to pay for the two policies, but Hunt refused to take any thing except upon the other policy. About the middle of November, plaintiff took and paid for the other policy which insured him from October twenty-first. The court nonsuited the plaintiff, to which plaintiff's counsel duly accepted.

Nathaniel C. Moak for the appellant. A parol agreement to insure binds the company to do so and to issue a policy,

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although no policy has in fact been written out or delivered. (*Train* v. *H. P. Ins. Co.*, 1 N. Y. W. Dig., 249; *Bunten* v. *Orient, etc.*, 8 Bosw., 448; 1 Abb. Ct. App. Dec., 257; *Sun, etc.*, v. *Davis*, 3 Robt., 254; 19 Abb. Pr., 214; 56 Mo., 153–157; May on Ins., § 44; *Angell* v. *Hartf. Ins. Co.*, 59 N. Y., 171; *Trustees, etc.*, v. *Trustees, etc.*, 19 id., 305; *Ellis* v. *Albany City F. Ins. Co.*, 50 id., 402; *Audubon* v. *Ex. Ins. Co.*, 27 id., 216; *Hotchkiss* v. *Ger. Ins. Co.*, 5 Hun, 90; *Carpenter* v. *Mut. Ins. Co.*, 4 Sandf. Ch., 408; *Post* v. *Ætna Ins. Co.*, 43 Barb., 352; *Whitaker* v. *Farmers' Ins. Co.*, 29 id., 312; *Rhodes* v. *Railway. Ins. Co.*, 5 Lans., 71; *Perkins* v. *Wash. Ins. Co.*, 4 Cow., 645; *Kelly* v. *Comm. Ins. Co.*, 10 Bosw., 82; *Leeds* v. *Mech. Ins. Co.*, 8 N. Y., 351; *Bidwell* v. *Astor Ins. Co.*, 16 id., 263.) If the insurer has waived payment of the premium at the prescribed time, it may be paid after loss. (*Howell* v. *Knick., etc.*, 44 N. Y., 277; *Worden* v. *Guardn., etc.*, 7 J. & S., 317; *Chase* v. *Hamilton, etc.*, 22 Barb., 527; *Martin* v. *Internl.*, 53 N. Y., 339; *Leslie* v *Knick., etc.*, N. Y. W. Dig., 232; 2 Hun, 616; *Fried* v. *Royal, etc.*, 47 Barb., 128.) Payment of the premium at the time of making the contract of insurance was not necessary to make it binding. (*Angell* v. *Hartf., etc.*, 59 N. Y., 171; *Bohen* v. *Wimburgh, etc.*, 35 id., 131; *Sheldon* v. *Atl., etc.*, 26 id., 460; *Wood* v. *Pough., etc.*, 32 id., 619; *Pratt* v. *N. Y., etc.*, 55 id., 505; *Hotchkiss* v. *Ger., etc.*, 5 Hun, 90; *Shear* v. *Phœnix*, 4 id., 800; *Dean* v. *Ætna, etc.*, 2 id., 358; *Carroll* v. *Charter Oak*, 40 Barb., 292; 1 Abb. Ct. App. Dec., 316; *Van Allen* v. *Farmers', etc.*, 4 Hun, 413; *Parker* v. *Arctic, etc.*, 1 T. & C., 397; 59 N. Y., 1; *Goit* v. *Nat. Pro., etc.*, 25 Barb, 189; *Pitney* v. *G. F. Ins. Co.*, 61 id, 335.) An agreement to give credit could be established by or inferred from the circumstances surrounding the transaction. (*Bodine* v. *Ex. Ins. Co.*, 51 N. Y., 117; 35 id., 131; *Bowman* v. *Ag. Ins. Co.*, 59 id., 521; 25 Barb., 189; *Smith* v. *Gergirty*, 4 id., 615; *Meehan* v. *Williams*, 2 Daly, 367; *Mayor, etc.*, v. *Butler*, 1 Barb., 325; *Decker* v. *Judson*, 16 N. Y., 443; May on Ins., 434; *Kolgers* v. *Guard. Ins. Co.*, 10 Abb. Pr. [N. S.], 176;

Buckbee v. *U. S. Ins. Co.*, 18 Barb., 541; *Helm* v. *Phila. Ins. Co.*, 61 Penn. St., 107; *Staunton* v. *W. As. Co.*, 21 Grant Ch. [Up. Can.], 578; *Bodine* v. *Ex. Ins. Co.*, 51 N. Y., 117; *Ecl. Ins. Co.* v. *Fahrenkrug*, 68 Ills., 463; *Hale* v. *Steel*, id., 231.) The case should have been submitted to the jury. (22 N. Y., 413; 24 id., 40; *Johnson* v. *Hathorn*, 2 Abb. Ct. App. Dec., 465; *Mizner* v. *Kussell*, 29 Mich., 229; *Post* v. *Ætna Ins. Co.*, 43 Barb., 351; *Pitney* v. *G. F. Ins. Co.*, 61 id., 336.)

Philip S. Crooke for the respondent. There was no sufficient evidence to establish that a credit was given, and there was nothing for the jury to pass upon. (*Bradley* v. *Potomac Ins. Co.*, 3 Am. R., 121; *Algeo* v. *Duncan*, 24 How. Pr., 210; 39 N. Y., 313; *McDonald* v. *Walter*, 40 id., 551.)

MILLER, J. The question to be determined in this case, is whether there was evidence upon the trial to submit to the jury to show a waiver of the condition in the policy, that the company should not be liable until the premium was actually paid. We think that there was such evidence, and that the court erred in refusing to submit the case to the jury and in granting a nonsuit. The payment of the premium at the time of making the contract of insurance is not necessary to bind the company, and if a credit be given by the agent it is equally obligatory (*Angell* v. *Hartford Ins. Co.*, 59 N. Y., 171), and the agent may waive such condition and give such credit. (*Boehen* v. *Williamsburgh Ins. Co.*, 35 N. Y., 131; *Sheldon* v. *Atl. F. and M. Ins. Co.*, 26 N. Y., 460.) There was evidence upon the trial which showed a prior dealing of the plaintiff with the company for many years, and that he was in the habit of getting policies without paying for them at the time. This was a circumstance to be considered, although by no means controling on the question as to the intention of the agent to waive the payment. The fact, however, that on a single occasion credit was given for the premium, as was proved, is to be considered upon the question of waiver. (*Bowman* v. *Agri-*

cultural Ins. Co., 59 N. Y., 521; see also 26 N. Y., *supra*, pp. 465, 466.) It also further appears from the testimony that the plaintiff on the 6th of September, 1871, called at the company's office to get the property insured for the ensuing year, saw the secretary, and tried to prevail upon him to reduce the old rate, which he declined to do, and the plaintiff then replied, "very well, I must have it insured." The next day afterwards the defendant made out the policy to the plaintiff, by which it insured the plaintiff from the sixth of September. On the ninth the plaintiff called again and asked the secretary if he had taken the building, and he replied that he had, at the old price. No objection was interposed to this and no further conversation took place. It, perhaps, was a fair question, whether, taken in connection with what had previously been said by the plaintiff, that he must have it insured, it might not be inferred that the plaintiff assented to this. Subsequently, on the sixteenth of October, the plaintiff again called for the purpose of obtaining an insurance upon other property. The secretary was not in, but the plaintiff then stated to the clerk that he had another policy, evidently referring to the one upon which this action is brought, and would pay for the two together, and the clerk replied, "very well," thus apparently assenting to the arrangement. The plaintiff did not call again until November eighth, after the fire, which took place on the seventh of November. The plaintiff informed the secretary of the loss and offered to pay for the two policies, but he refused to take any thing on the policy in suit, stating they were not liable because the house was not occupied, and he paid neither, leaving both. A few days subsequently he paid the premium on the second policy from its original date, which was accepted, thus conceding that this policy was valid.

Under the circumstances presented, although the testimony is not entirely conclusive and satisfactory, we think there was sufficient evidence to leave to the consideration of the jury the question whether a credit was not intended to be given and payment at the time waived.

As already seen, there was some evidence that plaintiff

assented to the old rate of premiums, at which he was informed the insurance had been taken, and it was a question to be determined whether, if the secretary intended to demand payment before the policy took effect, he should not have so said, and was not bound to speak. His failure to do so might, perhaps, bear the interpretation that he assented to a credit being given as had been the case on a previous occasion and as was given in the second policy. Besides, when plaintiff advised the secretary of the fire, no objection was made that the premium had not been paid, but a liability was repudiated on another and entirely a different ground — a want of occupancy. Some inference may also be derived from the circumstance that the secretary conceded that the company were liable on the second policy from date without payment or delivery, but this is not very material.

Considering all the circumstances and the previous dealings between the parties, we are of the opinion that it could not be held, as a matter of law, that there was no waiver of the payment of the premium according to the condition of the policy and no credit for the amount thereof given to the insured, and the court having committed an error in withholding the case from the jury and in granting the nonsuit, the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

AARON C. WHEELER, Respondent, *v.* RUFUS C. REYNOLDS, Appellant.

66	227
157	289
66	227
169	562

A parol agreement in reference to lands, not authorized by the statute of frauds (2 R. S., §§ 6, 8), is void as well in equity as in law.

Where, in reliance upon the agreement, one party has so far partly performed that it would be a fraud upon him unless the agreement should be performed, or where the agreement attempts to create a trust and was induced by fraud, the court has equitable jurisdiction to relieve

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against the fraud and to apply a remedy by enforcing the agreement. In such case, the jurisdiction is founded not upon the agreement but upon the fraud.

A part performance of a parol agreement, void by the statute of frauds, which will take it out of the operation of the statute, must be substantial, and the acts of part performance must also clearly appear to have been done solely with a view of performing the agreement.

Where a parol agreement, purporting to create a trust, is part of a scheme of fraud, or a party is fraudulently deprived of valuable rights or property by means thereof, the court will raise an implied trust, treating the person who perpetrated the fraud as trustee *ex maleficio*.

A fraud which will convert a purchaser of real estate into a trustee *ex maleficio* must be fraud at the time of the purchase, not afterwards; and the mere acquiescence or omission of another to take steps to obtain the property, although induced by faith in the purchaser's parol promise to purchase for his benefit, will not estop him from denying the trust; to work an estoppel, the promisee must have been induced, at the instance of the promissor, to incur some expense or perform some act which he otherwise would not have done.

A mere refusal to perform a parol agreement, void under the statute of frauds, is in no sense a fraud either in law or equity.

In an action for specific performance of an alleged parol agreement, plaintiff's evidence tended to show that he being the owner of premises upon which was a mortgage owned by defendant, and being insolvent, agreed by parol with defendant that the latter should foreclose his mortgage, bid in the premises and then sell or hold them until such time as they could sell them for their value, and, when sold, defendant to deduct the amount of his mortgage, with costs and expenses, and pay plaintiff the balance. It was not agreed that plaintiff should not attend the sale, or that he should prevent others from bidding. Defendant foreclosed and bid in the property; nothing was said at the sale about the agreement, and nothing said or done by defendant to prevent competition. Plaintiff did not attend the sale, but there was no proof that he omitted to attend or to procure others to attend in reliance upon the agreement, and that, but for the agreement, he or some other person procured by him could or would have bid it off. Defendant's claim, with costs and expenses, was about what the land was worth. There was no allegation or proof of fraud in the agreement or sale. Defendant took possession of the premises, paid taxes, etc., for nine years when this action was commenced, the land then having greatly increased in value. *Held*, that the alleged agreement could not be enforced either on the ground of part performance or as a parol trust.

Ryan v. *Dox* (34 N. Y., 307) distinguished.

(Argued April 26, 1876; decided May 23, 1876.)

Opinion of the Court, per EARL, J.

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, denying a motion for a new trial made upon a case and exceptions under section 268 of the Code.

This action was brought to enforce the specific performance of an alleged parol agreement in reference to lands. The facts appear sufficiently in the opinion.

John Van Voorhis for the appellant. The agreement claimed by plaintiff was void by the statute of frauds. (2 R. S. [Edm. ed.], 139, § 6; *Lathrop* v. *Hoyt*, 7 Barb., 59; *Levy* v. *Brush*, 45 N. Y., 589; *Sturtevant* v. *Sturtevant*, 20 id., 39; 2 Story's Eq. Jur., 61 § 1201; *Getman* v. *Getman*, 1 Barb. Ch., 440.)

Geo. H. Humphrey for the respondent. Equity will not allow defendant to retain the property obtained on the faith of the verbal contract without performing the same on his part. (*Ryan* v. *Dox*, 34 N. Y., 307; *Church* v. *Kidd*, 3 Hun, 254.) This was not a case within the statute of frauds. (2 R. S. [Edm. ed.], 139; 2 Story's Eq., § 759; 34 N. Y., 311; *Stoddard* v. *Whiting*, 46 id., 627; *Dodge* v. *Wellman*, 43 How. Pr., 427.)

EARL, J. In 1855, the plaintiff was the owner in fee of the lands described in the complaint, and then executed to the defendant a mortgage upon the lands, which is also described in the complaint. In April, 1865, the plaintiff had become insolvent, and the mortgage remained unpaid, and he was unable to pay it. At that time, the plaintiff claims a parol agreement was made as to the foreclosure of the mortgage, which he seeks to enforce in this action. No one was present when the agreement was made, except the parties, and they are the only witnesses thereto. The defendant, as a witness, denied the agreement. The plaintiff, as a witness, stated the agreement as follows: That he went to the defendant and stated to him that he would like to have him foreclose the mortgage and bid in the land at the sale, and then sell the

land or hold it to such time until they could sell it for what it was worth; that he would do what he could toward selling the land, and that defendant should do the same; and that when the land was sold he should take out the amount due upon his mortgage, and his costs and expenses, and pay the balance to the plaintiff. This was the whole agreement as proved by the plaintiff. It was not agreed that plaintiff should not attend the sale, or that he should prevent others from attending. The judge who tried the cause found that this agreement was made, and also found that it was made by the defendant upon the consideration that the plaintiff would not attend the sale, or procure others to bid against the defendant at the sale. There was no proof whatever of such a consideration. The learned judge probably inferred it from all the facts of the case. It would, doubtless, have defeated the agreement if plaintiff had attended at the sale and bid, or if he had procured others to bid; and yet it could not be said that in either event he would have violated his agreement. The alleged agreement was wholly for his benefit, and if he had before the day of sale obtained the money to bid in the land, and thus enabled the defendant to realize all that was due him, there would have been no ground of complaint on the part of the defendant, and no breach of faith on the part of the plaintiff; so, if the plaintiff had procured other parties to bid sufficiently, the substantial purpose of the agreement would have been accomplished. The plaintiff, therefore, gave up no right which he possessed, and the defendant, by virtue of the agreement, could receive no more than his due, and obtained no right which he did not before have. The judge found that, in pursuance of this agreement, the defendant proceeded to foreclose his mortgage. There was, however, no proof that he foreclosed it in pursuance of the agreement. The defendant testified that he did not. Nothing was said at the sale about the agreement; and there was no act of either party indicating that the foreclosure was in pursuance of the agreement. Nothing was done at the sale by the defendant to prevent competition; and one or more other parties did

bid. There was no proof or finding that plaintiff omitted to attend the sale, or to procure others to attend, in reliance upon the agreement, or that the plaintiff, but for the agreement, could or would have bid off the property, or procured some one else to do so for him. The defendant bid off the property for $800, but the amount due him upon his judgment in foreclosure, including costs and expenses of sale, was about $1,800, which was substantially all the land was worth. There was no allegation in the complaint, nor proof upon the trial, of any fraud practiced by the defendant upon the plaintiff in making the agreement, or in the foreclosure of the mortgage and the sale of the land. The defendant, after the sale, took possession of the land under his deed, and retained it, and paid the taxes, and received the rents, and this suit was not commenced until nearly nine years after the sale, when the land had greatly increased in value. If, under such circumstances, this alleged parol agreement can be enforced, our statute in reference to fraudulent conveyances and contracts, relative to lands, will, in large part, be nullified.

It must be conceded that the parol agreement was of itself absolutely void and conferred no rights and imposed no obligations upon any one. But one ground upon which it is sought to maintain this action is that the agreement was partly performed so as to take it out of the statute of frauds. (2 R. S., 135, §§ 6, 10.) To have such effect the part performance must be substantial, and nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed; and the acts of part performance should clearly appear to be done solely with a view to the agreement being performed. Generally if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement. The acts should be so clear, certain and definite in their object and design as to refer exclusively to a complete and perfect agreement, of which they are a part execution. (2 Story's Eq. Jur., §§ 761, 762;

Phillips v. *Thompson*, 1 Johns. Ch., 131; *Byrne* v. *Romaine*, 2 Edw., 445; *Jervis* v. *Smith*, 1 Hoffm., 470; *Wolfe* v. *Frost*, 4 Sandf. Ch., 77.) The object of the statute is to prevent frauds and perjuries, and hence courts of equity will take no notice of agreements depending upon parol evidence and otherwise within the statute, unless there are acts of part performance which go along with, relate to, and confirm the agreement, and which were clearly done in part execution thereof, and thus with the parol evidence establish the existence of the agreement. Now, what have we in this case? Every act done by the defendant was such as he had a perfect right to do by virtue of his mortgage and his deed upon the foreclosure sale, and apparently had no reference whatever to any agreement with the plaintiff. There was no act of the plaintiff which could be referred exclusively to the agreement. The only act of part performance pretended, is that the plaintiff did not attend the sale and bid. But his absence from the sale was just as consistent with other circumstances. He was insolvent and unable to pay the mortgage; and the amount due thereon, with the costs and expenses of sale, was equal to the value of the land. Hence he could have had little motive to attend the sale, of which public notice was given, as required by the statute. To hold that his mere omission to attend the sale under such circumstances was a part performance would be an application of the equity rule upon the subject wholly unauthorized by the best authorities.

The court at General Term affirmed the judgment upon the authority of the case of *Ryan* v. *Dox* (34 N. Y., 307). That case is quite unlike this in its essential features. There there was a sale under a foreclosure judgment, and the plaintiffs, the owners of the land, procured the defendant to bid off the same under a parol agreement that he would attend the sale and bid off the land for their benefit and advantage, and take the deed as his security for the amount paid by him, they agreeing that they would not find any other person to attend the sale and bid for them. He was to hold the deed as his security, and whenever the plaintiffs repaid him the amount paid

at the sale, together with interest and a reasonable compensation for his services, he was to convey the land to them. In pursuance of the agreement he attended the sale and bid off the land for $100, which was then worth $4,000. The others present at the sale were informed of the agreement, and therefore abstained from bidding. If plaintiffs had not relied upon the agreement, they would not have allowed the land to have been struck off for the sum of $100, but could have found other persons to have purchased the land, and thus would have saved the same from sacrifice. They relied upon the agreement, and made no other effort to procure the money or the assistance of friends to save and buy the land. They continued in the possession of the land after the sale for six years, and during all that time had the use of the land with the knowledge and consent of the defendants, and they paid the taxes thereon and made payments on account of incumbrances thereon. After the plaintiffs had been in possession of the land for six years the defendant obtained the possession, and then repudiated the agreement and denied plaintiffs' rights. The plaintiffs brought the action to enforce the agreement, and they were defeated in the Supreme Court; but this court reversed the judgment on the ground that there was sufficient part performance of the contract to take it out of the statute. (*Levy* v. *Brush*, 45 N. Y., 589, 596.) There the acts of part performance were clearly referable to the agreement, and were done in reliance thereon, and in part execution thereof, and the equity rule as to part performance, as above laid down, was fully satisfied.

But it is uncertain from the complaint and the findings of the judge upon what ground relief was granted to the plaintiff in this action, whether upon the ground of specific performance of a parol contract partly performed, or upon the ground that a trust had been created by the agreement of the parties and the circumstances of the case which the defendant was bound to execute. We must, therefore, further inquire whether there was any trust which could properly be enforced. Parol trusts in lands are condemned by the statute (2 R. S.,

135, § 6), and no mere parol agreement creating them will ever be enforced in equity. (*Sturtevant* v. *Sturtevant*, 20 N. Y., 39.) They are sometimes enforced where there is an element of fraud in the case, as where the parol agreement is obtained as part of a scheme of fraud, or when, by a parol agreement, a person is fraudulently deprived of his valuable rights or his property; and in such case a court of equity does not intervene to uphold or enforce the parol trust, but to relieve against the fraud which has been perpetrated by raising an implied trust; and it will treat the person who perpetrated the fraud as a trustee, not by virtue of the parol agreement, but as a trustee *ex maleficio* on account of the fraud. The mere refusal to perform a parol agreement void under the statute may be a moral wrong, but it is, in no sense, a fraud in law or equity. (*Levy* v. *Brush*, *supra*, p. 597.) Here there was no allegation or finding of any fraud, and hence if this agreement should be treated as an attempt to create a parol trust, it could not be upheld or enforced. In *Brown* v. *Lynch* (1 Paige, 147), *Cox* v. *Cox* (5 Richd. S. C. Eq., 365), *Keith* v. *Purvis* (4 Dess., 114), *Peebles* v. *Reading* (8 S. & R., 492), *Trapnall* v. *Brown* (19 Ark., 49), there was fraud which enabled the courts to enforce parol trusts. In *Levy* v. *Brush* a verbal agreement was entered into between the plaintiff and defendant by which the latter agreed to bid off in his own name and enter into a contract for the purchase of land, and pay from his own funds the necessary amount for that purpose, for the joint benefit of both; the plaintiff was to reimburse one-half of the money so paid, the deed to be taken in the name of both; and it was held, the defendant having bid off the land in his name and taken a contract thereof, but having refused to convey one-half of the contract to the plaintiff, that no action would lie to compel the execution of the agreement. There was as much ground for saying there as here that the plaintiff relied upon the agreement, so far that he did not himself bid or make arrangements with other parties for bidding, and yet it was held that it was not a case for the enforcement of the agreement either upon the ground

of part performance or of a parol trust repudiated by the trustee in wrong of the plaintiff. If one employs another by parol to buy land for him with his own money, and the latter buys the land and takes the deed to himself and refuses the former any right therein, the former cannot compel a conveyance to him, even by showing that but for his reliance upon the fidelity of his agent he would have purchased in person or through some other agent. (*Smith* v. *Burnham*, 3 Sumn., 435; 2 Story's Eq. Jur., 1201a.) In *Kellum* v. *Smith* (33 Penn. St., 158), it was held that a promise to purchase real estate at a sheriff's sale and to convey it to the defendant in the execution whenever he should repay to the purchasers their advances to him, does not raise a resulting trust in favor of the defendant. STRONG, J., says: "A resulting trust cannot be created in such a way. Such a trust can arise only from the payment of the purchase-money or from fraud in the purchase; fraud perpetrated by the grantee. Here the purchase-money of the sheriff's sale was paid by Bell & Co., and consequently the beneficial interest as well as the legal estate went to them. Had there been fraud in the purchase they might have been held trustees *ex maleficio*. But the fraud which will convert the purchaser at a sheriff's sale into a trustee, *ex maleficio*, of the debtor, must have been fraud at the time of the sale. Subsequent crime will not answer any more than subsequent payment of the purchase-money will convert an absolute purchase into a naked trust. Where the purchaser at a sheriff's sale promises to hold for the debtor and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement." The learned judge further says: "It may, in all cases, be assumed that where a promise is made to buy or to hold for another confidence is invited and more or less reposed. So it is in every parol contract for the purchase of lands; but the statute of frauds would be worse than

waste paper if a breach of the promise created a trust in the promissor which the contract itself was insufficient to raise. It may be that if, at the instance of the promissor, the promisee is induced to incur some expense or perform some act which he otherwise would not have done, the former shall be estopped from denying the trust. But however this may be, mere acquiescence or omission to take other steps to obtain the property, though induced by faith in the promissor, is not available for such a purpose." If, in the case under consideration, the defendant at the sale had declared that he was bidding in the property for the plaintiff, and had thus induced other persons to refrain from bidding and purchased the property for less than its value, a case would probably have been made for holding him as trustee, *ex maleficio*, of the plaintiff. (*Brown* v. *Dysinger*, 1 Rawle, 408; *Ryan* v. *Dox*, *supra*; 2 Wash. on Real Prop., 444.)

The case nearest like this which I have been able to find in the reports of this State, is that of *Lathrop* v. *Hoyt* (7 Barb., 59). In that case the defendant, at plaintiff's request, agreed, by parol, that he would go and attend a sale of the plaintiff's farm under a decree of foreclosure; that he would bid off the premises and take a deed in his own name, but he would give the plaintiff an opportunity to repay him the amount of his bid and have a reconveyance of the premises, and that the plaintiff should have two weeks' notice to pay the amount. The defendant accordingly bid off the farm and took a deed in his own name, and it was held that the agreement was void as being within the statute of frauds and would not support an action, and that there was no trust which could be enforced. That case was decided by a learned court and contains a correct exposition of the law. Although it was decided nearly thirty years ago our attention has not been called to any reported case in this State in conflict with it.

It is a mistake to suppose that parol agreements relating to lands are any more valid in equity than at law. They are always and everywhere invalid. But courts of equity have general jurisdiction to relieve against frauds, and where a

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parol agreement relating to lands has been so far partly performed that it would be a fraud upon the party doing the acts, unless the agreement should be performed by the other party, the court will relieve against this fraud and apply the remedy by enforcing the agreement. It is not the parol agreement which lies at the foundation of the jurisdiction in such a case, but the fraud. So in reference to parol trusts in lands. They are invalid in equity as well as in law. But in cases of fraud courts of equity will sometimes imply a trust and will treat the perpetrator of the fraud as a trustee, *ex maleficio*, for the purpose of administering a remedy against the fraud. For the same purpose it will take the trust which the parties have attempted to create and enforce it; and in such a case the fraud, not the parol agreement, gives the jurisdiction.

It follows, from these views, that the order must be reversed and new trial granted, costs to abide event.

All concur.

Order reversed, and ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants, *v.* JOHN FLANAGAN, Respondent.

Under the provisions of the act of 1873 (chap. 613, Laws of 1873) providing for the annexation of certain towns in Westchester county to the city and county of New York, which, by its terms (§ 18), was to take effect January 1, 1874, except as to parts "otherwise provided for," and which act declares (§ 5), that said towns shall constitute the tenth judicial district, a justice of which shall be elected "at the next general election," the election intended was the next after the passage of the act, *i. e.*, that of November, 1873.

The provisions of said act (§§ 1, 2) directing such annexation are within the exception, and such annexation took place at the passage of the act.

It was also the legislative intent (§ 2) that the election of 1873 should be conducted in accordance with the election laws then operative in the county of Westchester, not in conformity to the law applicable only to the city of New York.

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Accordingly, *held*, that a justice elected for said district at the general election in 1873, under the laws operative in said county of Westchester, and without regard to the registry acts applicable to the city, was regularly elected and entitled to the office.

Also *held*, that the act of 1874 (chap. 329, Laws of 1874) re-enacting and amending said act of 1873, was intended, and operated, as a confirmation of such election, even if conducted irregularly.

Where the people, through their constitutional agents, ratify and recognize the title of a citizen to an office, it is not competent for them to question it by *quo warranto*.

The legislature has full power thus to ratify.

People ex rel. v. *Bull* (46 N. Y., 57) distinguished.

(Argued April 26, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of defendant, entered upon a verdict. (Reported below, 5 Hun, 187.)

The nature of the action and the facts are set forth sufficiently in the opinion.

Geo. H. Forster for the appellants. If the act of annexation did not go into operation until January 1, 1874, the election of defendant in November, 1873, was illegal and void. (N. Y. Const., art. 2, § 1; id., art. 6, § 18.) The act of annexation took effect at the date of its passage as to the annexation of the territory and the right of the New York city and county authorities to conduct an election therein. (Laws 1873, chap. 613, § 1, p. 928; *Barton* v. *Himrod*, 8 N. Y., 438, 488; *Bradley* v. *Baxter*, 8 How. Pr., 18.) The election of defendant being held by persons who were neither *de jure* nor *de facto* officers of New York city and county, was illegal and void. (*King* v. *Corpn.*, 6 East, 356; *Wilcox* v. *Smith*, 5 Wend., 221; *People* v. *Albertson*, 8 How. Pr., 363; *Conover* v. *Devlin*, 15 id., 470; *People* v. *Cook*, 14 Barb., 289; N. Y. Const., art. 6, §§ 18, 19; *McKoan* v. *Devries*, 3 Barb., 196; Story on Const. [4th ed.], 333, § 451; *People* v. *Lawrence*, 34 Barb., 179, 186; *People* v. *Bull*, 46 N. Y., 57, 60.) The provisions of section 5 of the act of 1873, if it was

intended to allow a district judge to be voted for November 4, 1873, subject to the popular vote on the annexation question under section 17, were unconstitutional and void. (*Barton* v. *Himrod*, 8 N. Y., 483, 488; *Wynebamer* v. *People*, 13 id., 429; *People* v. *Draper*, 15 id., 558; *Rumsey* v. *People*, 19 id., 46; *Town of Duanesburgh* v. *Jenkins*, 57 id., 187.)

Abel Crook for the respondent. The election of defendant was properly held at the next general election after the passage of the act of 1873. (*People* v. *Cowles*, 13 N. Y., 350; Sedgw. Stat. and Const. Law, 229; *People* v. *Utica Ins. Co.*, 15 J. R., 358, 380; *Jackson* v. *Collins*, 3 Cow., 89; *Tonnele* v. *Hall*, 4 Comst., 140.) The provisions of the annexation act of 1873, as to the manner of the election, are directory and not mandatory. (*Foot* v. *Prosse*, Stra., 625; *Rex* v. *Inhab. of B.*, 8 B. & C., 99; *Cole* v. *Green*, 6 M. & G., 872; *Pond* v. *Negus*, 3 Mass., 230; *Williams* v. *School Dist.*, 21 Pick., 75; *City of Lowell* v. *Hadley*, 8 Metc., 180; *People* v. *Allen*, 6 Wend., 487; *Jackson* v. *Young*, 5 Cow., 69; *People* v. *Runkle*, 9 J. R., 147; *People* v. *Peck*, 11 Wend., 604; *Marchant* v. *Langworthy*, 6 Hill, 646; *Gale* v. *Mead*, 2 Den., 160; *Thomas* v. *Clapp*, 20 Barb., 165; *People* v. *Holley*, 12 Wend., 481; *In re M. and H. R. R. Co.*, 19 id., 143; *Stryker* v. *Kelly*, 7 Hill, 9; *People* v. *Supvrs. Chenango*, 4 Seld., 317; *People* v. *Cook*, 8 N. Y., 88; *Stevenson* v. *Mayor*, *etc.*, 3 T. & C., 133.)

CHURCH, Ch. J. This is an action in the nature of a *quo warranto*, to test the title of the defendant to the office of justice of the Tenth District Court in the city of New York, which district is composed of the three towns set off from Westchester county, and annexed to the city of New York by the act chapter 613 of the Laws of 1873. By the fifth section of the act, it was declared that the said territory should constitute the tenth judicial district of the city of New York, and that, "at the next general election," there should be

elected a justice of said district. The act was passed May 23, 1873. By the eighteenth section it is declared that the act should take effect on the 1st day of January, 1874, "except as to such parts as are otherwise provided for, and, as to such parts, it shall take effect at the time or times in this act specified."

The defendant claims title by virtue of an election in 1873, at which, it seems, the respective parties put up and voted for candidates for this office. There is no question but that the election was fairly conducted, nor that the defendant received a clear majority of the votes cast, and we may presume that he entered upon the discharge of his duties on the 1st day of January, 1874, and has continued to discharge them since that time, and there is no other claimant for the office. Under these circumstances, and being a question between the defendant and the people, and dependent upon the construction to be given to acts of the legislature, it seems reasonable that the defendant, whose good faith is not questioned, should have the benefit of the most favorable construction. Two grounds are insisted upon by the appellants: first, that the election was premature, and could not have taken place until the general election in 1874; and, second, that the election was void, because not conducted according to the laws applicable to the city of New York, in respect to registry, etc.

It cannot be denied that, by the terms of the act of 1873, the first question is not free from difficulty. The general rule is, that acts of the legislature speak from the time they take effect, unless a different intention is manifested. It is conceded, and claimed in the brief submitted by the learned counsel for the appellants, that annexation of the territory to the city took place at the passage of the act, and that sections 1 and 2 are within the exception contained in section 18, above cited, This is an important point, because if this was not so, the election of a district justice, which can only take place, by the Constitution, *in cities*, would be clearly void. We must, therefore, assume that, for this purpose, at least, the territory was a part of the city at the time of the election.

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It is claimed by the defendant that section 5, authorizing the election of district justice at the *next* general election, is also within the exception, and that the word "next" means next after the passage of the act. There are plausible grounds for this construction. That section provides for the appointment of a police justice for the territory on the 15th day of December, 1873, thus showing a design to have the judicial organization, applicable to the city, complete when the act should take effect, which design would be frustrated, in part, by not applying the word "next" to the election of 1873, for a district justice. There are other acts required to be done before the general act took effect on the 1st January, 1874. The act of 1873 is, in some respects, incongruous. By reference to the journals of the legislature, it appears that the act, as first passed by the senate and assembly, was to take effect on the 1st day of July, 1873, but, before it was signed by the governor, it was recalled and a section inserted providing for submitting the question of "annexation" to the people of Westchester and New York, and changing the time of its taking effect to the 1st of January, 1874, with the exception before referred to. The original act clearly required the election of a justice of the District Court at the general election of 1873, and that the person elected should enter upon his duties January 1, 1874. The omission to rectify the technical application of the word "next" was quite natural; but the intention to provide such an officer, capable of performing his duties on the 1st of January, 1874, cannot be claimed to have been changed by the adoption of the amendment providing for a submission. Substantially, by both acts, practical annexation became operative on the 1st January, 1874, subject to the contingency provided by the amendment, of an adverse vote of the people; but there is no indication of an intention to delay a complete judicial organization beyond the 1st day of January, 1874.

If we assume that the election of this officer might take place at the general election in 1873, we think the Supreme Court clearly right in holding that it was not contemplated to

hold the election, according to the registry acts, applicable only to the city of New York, and we concur with the views on this point expressed in the opinion of DAVIS, J. There is undoubtedly language which, taken literally, is capable of this construction, but the construction is obviated by applying it to elections for such municipal officers as are elective after the annexation becomes fully operative on the 1st day of January, 1874. It would be impracticable to comply with the act upon the construction claimed. The officers of the city had no power to organize this territory under the registry acts, and, if they had, or if the officers of the territory had the power, it would involve the holding of two elections at the same time and place under different laws. An intent to create machinery so cumbrous, unnecessary and inconvenient, if not impracticable, should not be imputed to the legislature, unless required by the clearest expressions. The construction claimed is an argument against the right to elect this officer in 1873, but, when that right is conceded, the construction must be rejected. It seems to me that the case depends upon the first question, whether the election was authorized in 1873, and, upon that question, the act (chap. 329 of the Laws of 1874) has an important bearing in resolving any doubts which may exist under the act of 1873. The act of 1874, re-enacted with some amendments, the annexation act of 1873, probably for the purpose of obviating any question about the possible effect of the submission clause. By the eighteenth section the several acts done and performed under and in pursuance of the act of 1873 were expressly confirmed, and, as to provisions in that act "as to acts to be done, prior to the passage of this act, the said provisions shall be construed as if this act had passed on the 23d day of May, 1873." When this act was passed (May 6, 1874,) the defendant had been elected, as he claimed, under and in pursuance of the act of 1873, and had entered upon the discharge of his duties, all of which must be presumed to have been known to the legislature of 1874, and we must assume that the act of that year was intended to confirm such election, and to recognize, so far as

Statement of case.

the legislature could, the defendant as legally entitled to the office. Its legal effect may be regarded as a legislative construction of the act of 1873, both as to the time of holding the first election of district justice, and the inapplicability of the registry acts of the city of New York, and, as a confirmation of the election, even if conducted irregularly.

When the people, through their constitutional agents, thus ratify an election and recognize the title of a citizen to an office, it is not competent for them to question it by *quo warranto*. The legislature had full power to do this. Their action is not within the condemnation of *People* v. *Bull* (46 N. Y., 57). In that case, there was an attempt to extend the time of an officer, elective by the Constitution, and it was held unconstitutional as a legislative appointment for the time for which the term was extended. Here, there is no doubt of the authority of the legislature to authorize an election according to the laws applicable to Westchester county, and an election was actually had, as claimed, in conformity with the act. If so, the defendant is a constitutionally elected officer, and it was competent, in case of doubt, for the legislature, as between the people and the defendant, to construe its own act and to waive any irregularity in holding the election, and thus confirm the title.

The judgment must be affirmed.

All concur; ALLEN, J., on ground that the election was valid under act of 1873.

Judgment affirmed.

NANCY SUTTON, Administratrix, etc., Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

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Although a railroad company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track, nor will a departure in

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some degree or particular by its employes from the ordinary course of procedure make it liable for an injury resulting therefrom, unless it involved the doing of an act which might reasonably be anticipated would result in injury to a person lawfully on the track under the license; the licensees acting under it take the risks incident to the business.

S., plaintiff's intestate, was employed in a foundry, the workmen in which had been accustomed to cross defendant's tracks at a certain point. It was defendant's daily custom to disconnect cars from trains backing down on the track nearest the foundry, which by their momentum would pass by the foundry, when a brakeman would apply the brakes. S. came out of the foundry as cars so disconnected were passing. They stopped just as the rear one passed the door. He stepped across the track, when his progress was arrested by a train approaching on the second track, and he stepped backward upon the track he had crossed, where he was struck and killed by the disconnected cars, which, in consequence of a slight down grade, the brakeman having failed to apply the brakes, had started of themselves slowly backward. No instance of a car thus running backward had ever been known before. In an action to recover damages, *held*, that a refusal of the court to charge that the defendant owed no duty to the deceased to set the brakes, or otherwise fasten the cars, was error; and that the evidence did not make out a cause of action.

Sutton v. *New York Central and Hudson River Railroad Company* (4 Hun, 760) reversed.

(Argued April 27, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 4 Hun, 760.)

This action was brought for the alleged negligent killing of William Sutton, plaintiff's intestate.

The deceased was employed in the carpenter shop of the Clinton foundry, situate west and adjacent to defendant's tracks and roadway in the city of Troy. At a point opposite this shop the employes in the foundry had for a long time been in the habit of crossing the track to reach Madison street. There was a regular beaten path to the fence along the street, where steps had been placed to enable persons to get over. Sutton started out of the carpenter shop with a pail on his arm to go to a well across the tracks, for some water. As he went

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out of the door five cars passed northward on the west track, nearest the shop. These cars had been disconnected from a train of ten cars, the engine and other cars giving them as they were disconnected a "shove" or "kick," which sent them north so far that the south car was nearly opposite the door of the shop where they stopped. Sutton then started across the track. He crossed the west track, but was stopped by the approach of a train on the east track, and looking to the east he stepped backward upon the track he had just crossed. At the point there was a slight down grade in the tracks toward the south. The five cars had in consequence, after stopping, started back slowly of themselves to the southward, and as Sutton stepped backward they struck and killed him. There was a brakeman on the five cars as they passed, who attempted to apply the brake, but failed to set it so as to arrest the motion of the cars. When they stopped he left the cars, and there was no one in charge of them, when they moved backward.

It had been defendant's daily custom for years to back up and "shove" cars on the west track in the same way. The brake was usually applied to such disconnected cars. No instance had ever been known before of their thus running backward of themselves.

Defendant's counsel on the trial moved for a dismissal of the complaint upon the ground, among others, that no negligence on the part of defendant had been proved. The motion was denied and defendant's counsel duly excepted.

Said counsel requested the court to charge, among other things, "that defendant owed no duty to the deceased to set the brakes or otherwise fasten the cars where they were left." The court refused so to charge, and the said counsel duly excepted.

Further facts appear in the opinion.

Frank Loomis for the appellant. The custom of crossing defendant's tracks at the place where the accident occurred did not, of itself, confer any right, or impose any additional

duty upon those so crossing (*Matze* v. *N. Y. C. and H. R. R. Co.*, 1 Hun, 417; Laws 1850, chap. 140, § 44; *Bolch* v. *Smith*, 7 H. & N., 732.) The deceased was guilty of contributory negligence. (*Wilcox* v. *R. and W. R. R. Co.*, 39 N. Y., 358; *Nicholson* v. *Erie R. Co.*, 41 id., 525; *Culhane* v. *N. Y. C. and H. R. R. R. Co.*, 60 id., 133; *Baulec* v. *N. Y. and H. R. R. Co.*, 59 id., 356, 366; *P. and R. R. R. Co.* v. *Hummell*, 44 Penn., 375; *Gillis* v. *Penn. R. R. Co.*, 59 id., 129; *Sweeny* v. *O. C. and N. R. R. Co.*, 10 Al., 368; *Maynard* v. *B. and M. R. R. Co.*, 115 Mass., 458.) Defendant was not bound to guard against such an accident, as it was not proved that it was apprehended. (*Dougan* v. *C. Tr. Co.*, 56 N. Y. 1; *Crocheron* v. *N. S. S. I. F. Co.* id., 656; *Fairbanks* v. *Kerr*, 70 Penn., 86.)

Eseck Cowen for the respondent.

ANDREWS, J. The plaintiff's intestate, at the time he was killed, was on the track and premises of the defendant. He had left the shop where he was employed with the intention of crossing the railroad track so as to reach a public street which extended to, and abutted upon, the defendant's road. The place where he was, at the time of the accident, was not a public way, and there was no public right of passage over the track. He was not, however, a trespasser in going up it. There was, under the circumstances proved, an implied license for the workmen in the foundry to cross the track at this point for the purpose of reaching the highway. They had, for twenty years, been accustomed to cross the railroad in a beaten path made by this use, and, on the other side of the track, adjoining the street, was a fence with steps to enable persons crossing the track to get over, which steps were allowed to remain by the railroad company, and a witness testified that he thought the company placed them there. There was no agreement between the proprietors of the foundry and the defendant giving the workmen a right to cross the track, and no claim of right to do so was, ac

far as it appears, ever asserted. It was, however, owing to the situation of the foundry premises, a great convenience for the workmen to be permitted to cross at this point.

It must be assumed, in disposing of this case, that the plaintiff's intestate, in crossing the track, was acting under the implied license of the defendant, and that the defendant knew that the workmen were accustomed to cross there. The fact that the plaintiff's intestate was killed by the cars on the defendant's road raises no presumption of negligence against the company. The plaintiff, in order to recover, was bound to establish affirmatively that the death was caused by the violation of some duty the defendant owed to the deceased. Otherwise, there was no negligence shown, and the action cannot be maintained. I think that the evidence did not establish a cause of action against the defendant. In addition to those already stated, the following facts were shown: There are two tracks in front of the shop where the accident took place. Just before it occurred, a train of ten cars was backed up from the south on the west track (next to the shop). Before reaching the shop, five of the cars were disconnected, and the locomotive, with the other five, gave the disconnected cars a "kick," which sent them north so far that the south car was nearly opposite the door of the shop, and there they stopped. About this time Sutton (the deceased) started out of the shop, with a pail on his arm, to go for some water to a well on the other side of the track, beyond the railroad. He crossed the west track, south of the five cars, and then stopped, his further progress being arrested by a train advancing on the second track. He was looking towards the east, and, for greater security (as may be supposed), stepped backwards on to the west track, and, at this moment, the five cars which were moving southerly struck and killed him. These cars had no locomotive attached, and no one was then in charge of them. To account for their running back, it was shown that, at this point, there was a slight grade in the defendant's road towards the south of one and one-half inches in twelve feet, and that a jarring or trembling of the

Statement of case.

JOHN A. GODFREY, Appellant, v. WILLIAM MOSER, Respondent.

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In reviewing a decision of the General Term reversing a judgment entered upon the report of a referee, where it is certified that the order of reversal was made upon questions of fact as well as law, this court occupies the position of the General Term as to the facts as well as the law.

Where a review of facts by an appellate court is proper, it is, as a general rule, its duty to examine the evidence and determine the facts for itself; and the rule that where there is conflicting evidence or any evidence to sustain the finding it is error to reverse, does not apply. (Code, §§ 268, 348.)

Where, in reviewing a judgment entered upon the report of a referee in an action upon an account, the General Term find certain items of said account to have been established by the evidence and others not, it is entirely within its discretion whether to permit the judgment to stand at the election of the plaintiff for the items it approved, or to reverse the whole judgment and order a new trial (Code, § 330), and the exercise of this discretion is not reviewable here.

Where, upon appeal to this court from an order of General Term granting a new trial on a case or exceptions, the court determine that no error was committed, it is imperative that "they shall render judgment absolute upon the right of the appellant" (Code, § 11, sub. 2); and, although injustice may be done him, the court has no authority to allow him to withdraw his stipulation for "judgment absolute" or to give him the benefit of a new trial; when, instead of availing himself of the new trial granted by the court below, he appeals, he necessarily assumes the hazard of injurious consequences.

(Argued April 28, 1876; decided May 23, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff and granting a new trial.

This action was brought to recover an alleged balance of an account for services rendered by plaintiff as attorney and counsel for defendant.

The original order of reversal by the General Term was amended by adding after the word "reverse," the words "on questions of fact as well as of law."

The original notice of appeal did not contain the stipulation

could not reasonably have anticipated that they would move towards him, he cannot be charged with negligence in not looking up the track before stepping back upon it to avoid the other train. The negligence charged upon the defendant was of omission only, the omission of the brakeman to adjust the brake before leaving the cars, which if done would have made this accident impossible. If the brakeman knew that there was a slight descending grade at this place, he could not have anticipated danger to life, from the slow movement of the cars a few feet down the grade. It is not claimed that he saw the deceased before he was injured, and special precaution were not required of him in the absence of any indication that he was in danger. It was not, I think, negligence towards the deceased for the brakeman to omit a precaution which, if taken, would have prevented the injury, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened from the omission. I am of opinion that the court erred in refusing to charge that the defendant owed no duty to the deceased to set the brake, and otherwise fasten the cars at the place where they were left. The case differs in some of its circumstances from *Nicholson* v. *Erie Railway Company* (41 N. Y., 525), but it is, I think, within the principle of that decision, and the cases cited in support of it. Negligence is ordinarily a question for the jury, but only when the facts would authorize a jury to infer it.

The judgment should be reversed, and a new trial granted.

All concur, except CHURCH, Ch. J., not voting, and ALLEN, J., not sitting.

Judgment reversed.

the Court of Appeals" The rule insisted upon by the appellant, that when there is conflicting evidence, and when there is any evidence to sustain the finding, it is error in the General Term to reverse the judgment, is not applicable in any case where the appellate court has a right to review the facts. When such review is proper, it is the duty of the appellate court to pass upon the facts from the evidence, and in this respect the duty is different from what it is in reviewing a judgment entered upon the verdict of a jury. In that case, the right of reviewing the facts is not conferred, and to reverse upon the facts, there must be an absence of any evidence to sustain the verdict; so in this court, in reviewing a judgment entered upon the report of a referee, in the absence of such certificate, the finding of facts is conclusive, if sustained by any version of the evidence which the referee was authorized to give it. In reviewing the facts, proper deference should be awarded to the judgment of the referee in cases of serious doubt, upon conflicting evidence, especially when it is propable that the appearance of the witnesses, or their manner of testifying, was, or might have been, controlling in determining the questions; but these cases are rare, and, in general, it is the duty of the appellate court to take the responsibility of examining the evidence and determining the facts for itself.

We have examined the evidence, and are inclined to concur with the General Term upon the points taken by it. It is unnecessary to determine that, although the services stated by the plaintiff to have been performed, the value of which was proved, were greatly exaggerated, and, to some extent, the plaintiff's testimony discredited, yet the referee was not authorized to fix some value upon the services proved to have been rendered; but, under all the circumstances developed, we think that the evidence does not justify any thing like an allowance of $2,000 for the compromise, and the result reached by the General Term was substantially right, and, with this qualification, we concur in the opinion of DANIELS, J. It is possible that injustice may be done the plaintiff by his not going back for a new trial ordered by the court below. This

court has no alternative, upon affirming the decision, but to order judgment absolute against him upon his stipulation. Having elected to have the "whole or nothing," we see no way of relieving him from the legal consequences of his act.

Judgment absolute must be ordered against the plaintiff.

All concur.

Order affirmed and judgment accordingly.

Upon a subsequent motion for a reargument, the following opinion was given:

Per Curiam. Motion for reargument on the following grounds:

1. That the rule was misapprehended as to the right of the General Term to reverse a judgment entered upon the report of a referee upon questions of fact, when there was conflicting evidence, and the credibility of witnesses was involved, by reason of which the facts were not presented fully by the plaintiff.

There has never been any doubt that the General Term has a right, and that it is its duty, to consider the facts in such a case, and pass upon them (Code, §§ 348, 268); and when the General Term certifies that the reversal is upon questions of fact, such questions are open to review in this court. (§ 268.) An examination of appellant's brief shows that the facts were very fully presented. We see no reason to change the conclusion upon the questions of fact.

2. That it was the duty of the General Term, instead of reversing the whole judgment, to have permitted the judgment to stand for such items of the account as it approved, at the election of plaintiff.

An item of $1,000, less $215 paid thereon, it seems the General Term regarded as sufficiently proved, and that court had power to reverse the judgment and order a new trial, unless the plaintiff stipulated to reduce it to that amount, but it was discretionary whether such an order should be made, or a reversal and new trial should be ordered.

The Code (§ 330) authorizes the appellate court to affirm,

modify or reverse a judgment, "and may, if necessary or proper, order a new trial." Whether necessary or proper to order a new trial, was for the court below to adjudge. It was clearly proper to order a new trial on the whole case. The whole recovery was over $4,000 and it was reversed for errors in both of the principal items. The item of $1,000 allowed by the referee the General Term held was erroneous, because payments of $215 were not allowed; and it held, also, that although the referee was justified, upon the evidence, in allowing $785 upon that item, yet that it was proper to order a new trial.

It was not a legal error to grant a new trial upon the whole case, and the order was ostensibly for the benefit of the plaintiff.

3. That injustice will result to the plaintiff. This may be true, but, to avoid it, he should have gone back for a new trial. The Code (§ 11, sub. 2) is imperative that in such a case this court "shall render judgment absolute upon the right of the appellant." If we could see any legal mode of doing it, we might feel inclined to give the plaintiff the benefit of a new trial, but there is no such mode, without establishing a very loose and dangerous precedent, of permitting a withdrawal of the stipulation, a proceeding for which there is no legal authority. If parties stipulate their cases into this court, instead of availing themselves of the new trial ordered by the court below, they necessarily assume the hazard of injurious consequences. It is the statute which produces the result, and not the court.

4. That no stipulation was necessary when the first notice of appeal was served and none given.

The stipulation was made a part of the original notice by the order of this court.

The motion must be denied.

All concur.

Motion denied.

Statement of case.

ISAAC S. WELLS, Appellant, *v.* EDMUND MILLER, Respondent.

The right to contribution between co-sureties depends upon principles of equity rather than upon contract. The equity does not arise from the fact simply that both parties are sureties. They must stand in the same relation to the principal and without equities between themselves, giving one an advantage over the other.

It is competent to prove by parol the relation of the parties, and any extrinsic facts affecting the equities.

Plaintiff and B. were copartners, the latter being the managing partner, which was known to defendant, he having done considerable business with the firm. B. negotiated a loan for his individual benefit from one C. to be made upon a satisfactory note. He drew a note for the amount to which he signed the firm name, and defendant, at his request, signed as surety supposing it to be for the benefit of the firm. C. objected to the note because it was signed in the firm name and requested one signed by the members individually. A new note was drawn signed by B., and by plaintiff without adding the word "surety" to his name, and then by defendant. Plaintiff did not know of the making of the first note until the second note was presented to him for signature when he was informed of it and was told the reason of the change, and that defendant would sign the second note. In an action to enforce contribution, *held*, that plaintiff, although having no affirmative knowledge, was bound to presume ignorance on the part of defendant of the character of the first note from its form and the manner of signing it, and also to presume that B. would inform him, when he was applied to for his signature to the second note, of the reason why a change was desired; that he impliedly authorized B. to continue the deception by not requesting him to inform defendant of the character of the loan or affixing "surety" to his name; and that, therefore, plaintiff knowing facts charging him with knowledge that defendant signed, and intended to sign, as surety for him, and by silence and implied authority having contributed to induce him to again sign in the same character, he was not entitled to contribution.

Norton v. *Coons* (6 N. Y., 33) distinguished.

(Argued April 28, 1876; decided May 23, 1876.)

APPEAL from order of the General Term of the Supreme Court in the sixth judicial district, reversing a judgment in favor of plaintiff entered upon the report of a referee, and granting a new trial.

This action was brought to compel contribution as between co-sureties.

Statement of case.

In 1854 plaintiff and one Brown were partners in business at Elmira, doing business under the firm name of "G. W. Brown & Co." Brown was the managing man of the firm, which was known to defendant, he having transacted a large amount of business with the firm. In January, 1854, Brown arranged with one Cromwell for a loan of $1,000 for his individual benefit, for which he was to give a satisfactory note. Brown executed a firm note for the amount, which defendant indorsed at his request. Brown stated to him, "we want $1,000 and can get it of Mr. Cromwell." Cromwell declined to accept the note, saying he wanted a note with the individual names of the parties and not one with the partnership name. Brown thereupon drew up another note in the form of a joint and several note payable to the order of Cromwell. This he signed himself and presented to plaintiff for his signature. He informed plaintiff then for the first time of the former note and of Cromwell's refusal to accept it. He requested plaintiff to sign, stating to him that defendant would sign it also. Thereupon plaintiff signed without adding the word "surety" to his name. Brown took the note to defendant, told him of Cromwell's refusal to accept the first note, and the reason, and that he had destroyed it; defendant signed under plaintiff's name. Upon receipt of the note Cromwell advanced the money as agreed. The referee found that when defendant signed the note he had no knowledge that it was for the individual benefit of Brown and supposed it was for the benefit of the firm, but that plaintiff had no knowledge that defendant was ignorant of the real object of the note or that he supposed it to be for the benefit of the firm; that there was no communication, understanding or agreement between plaintiff and the defendant in regard to the note or their liabilities to each other as sureties; that after the giving of the note Brown absconded and a judgment having been obtained against the parties to the note plaintiff paid it. As conclusion of law, the referee held defendant liable for contribution.

Further facts appear in the opinion.

Opinion of the Court, per CHURCH, Ch. J.

James L. Woods for the appellant. The liability of co-sureties to contribution does not depend upon any contract between the parties, but rests upon the right of the matter. (*Norton* v. *Coons*, 2 Seld., 33, 36, 37; *Barry* v. *Ransom*, 2 Kern., 466.) To bar plaintiff's right to contribution it must appear positively or by legal intendment that plaintiff intended to stand as principal as to defendant. (*Warner* v. *Price*, 3 Wend., 397.)

J. McGuire for the respondent. Where one of two sureties, without the knowledge of his co-surety and by previous arrangement with the principal debtor, receives a share of a sum borrowed he is not entitled to contribution if obliged to pay the debt. (*McPherson* v. *Talbot*, 10 G. & J., 499.)

CHURCH, Ch. J. The plaintiff claims that he was a co-surety with the defendant upon the note of Brown of $1,000, which he has paid, and that he is entitled to contribution. The difference of opinion among the learned judges who have considered the case is unusual. The decision of the referee was for the plaintiff — that of the General Term for the defendant, but with one dissenting judge. In the Commission of Appeals, four of the commissioners were equally divided, and one took no part, so that of the eight judges, including the referee, who have passed upon the case, in three different tribunals, they were equally divided in opinion, four for the plaintiff and four for the defendant. It is, therefore, presumable that the case is quite evenly balanced, and might, perhaps, be decided either way without violating any rule of law. The difference of opinion has arisen not so much from a difference as to rules of law as upon the character of the transaction. The facts are undisputed; but upon their proper construction and the inferences to be drawn from them depend the application of legal principles, and, as to such construction and inferences, it is quite natural that lawyers and judges should differ. I have examined the case with considerable care and have arrived at a conclusion adverse to

the plaintiff's right of recovery, and, without elaborating the subject, I shall briefly state the reasons which have influenced my judgment.

The right to contribution between co-sureties depends upon principles of equity rather than upon contract. It is well settled that the liability exists, although the sureties are ignorant of each other's engagement. (14 Ves., 160; 2 Seld., 33; 2 Kern., 462.) The equity springs out of the proposition that, when two or more sureties stand in the same relation to a principal, they are entitled equally to all the benefits, and must bear equally all the burdens of the position. In such a case the maxim "equality is equity" applies. It is not sufficient that both parties are sureties — they must occupy the same position in respect to the principal, and without equities between themselves, giving an advantage to one over the other. (58 N. Y., 583.) And it is competent to prove by parol the relation of the parties, and that one surety agreed to indemnify another, or any extrinsic facts affecting the equities between them. (2 Kern., 462.)

The real question is, whether the same relation to Brown, within the comprehensive equitable rule referred to, did exist between these parties. On the part of the plaintiff, it is claimed that it is a case of ignorance on the part of the defendant, as to the fact that the plaintiff was a surety, and a signing on his part, under a misapprehension of the fact, induced partly by the representation of Brown, for which the plaintiff was in no sense responsible, and that the case of *Norton* v. *Coons* (6 N. Y., 33) is controlling in his favor. To determine this we must analyze the transaction. The plaintiff and Brown were co-partners, the latter being the managing member, and the defendant had done with the firm, through Brown, considerable business. If the defendant had loaned the money upon the first note made by Brown, in the name of the firm, the latter would have been liable upon the well-settled principle of mutual agency between partners, within the scope of their business, although the money may have been borrowed for Brown, individually, provided the defend-

ant was ignorant of that fact. (Story on Part., § 102.) The same principle would apply in making the defendant a surety for the firm upon the first note signed by him. If Brown might bind the firm for money borrowed of the defendant, he might also bind the firm by procuring his signature, as surety for the firm, to enable him to borrow money of a third person. It was one of the usual means of transacting the business of the firm, and he had implied authority, especially as managing partner, to do any thing necessary for that purpose. If, therefore, the creditor had taken the note in that form, it is very clear that the plaintiff would have been liable upon it, and without the right of contribution against the defendant. As to the defendant, he would have occupied the position of principal, although as to Brown he was a mere surety. The creditor requested that the form of the note be changed by having the members of the firm sign their individual names, which was done, and the defendant again signed the note in that form, and this change has created the embarrassment in the case. Much stress is laid upon the fact that the plaintiff did not know of the making of the first note until the new note was presented to him, and that he then signed in fact as surety, and that he is therefore entitled to the benefit of that position within *Norton* v. *Coons* (*supra*). If there had been no other transaction but the signing of this note by the plaintiff, there would have been some force in this view. But he was then informed of the first note, and I assume of the signing of it, by the defendant as surety, and was told that the creditor desired the individual signatures of the firm. He, therefore, knew the facts which in legal effect constituted the defendant a surety for the firm, and is, therefore, chargeable with knowledge of the real position of the defendant upon the first note. True, the referee found that the plaintiff had no knowledge that defendant was ignorant of the real object of the note, or that he supposed it to be for the benefit of the firm. I construe this to mean that he had no affirmative knowledge, and had not been informed specifically of that ignorance. This is the only construction warranted by

the evidence and by the other findings, and therefore it must be presumed to have been intended. The plaintiff was bound to presume ignorance on the part of the defendant from the form of the note and the manner of signing it. He knew that the defendant had undersigned a firm note as surety, got up to raise money, and the presumption is, and the plaintiff was bound to presume it, that he signed it with the intent and for the purpose which its form indicated. He cannot now say that he didn't know that the defendant was ignorant of the real character of the note. It was not claimed by him on the stand, nor is there the slightest evidence, that he supposed even that the defendant had been informed that this money was for the individual benefit of Brown, while the facts of which he was then informed indicated that the defendant thought as he acted, and that when the latter signed the note as surety for the firm he supposed it was for the benefit of the firm. Brown told the plaintiff that the creditor desired the change in the form of the note, and that the defendant would sign it, and the plaintiff was bound to presume that Brown would inform the defendant of the reason why a change was desired when he applied for his signature, and instead of requesting Brown to enlighten the defendant as to the character of the loan, or affixing the word "surety" to his name, or in any manner notifying him of his real position, he impliedly authorized Brown to continue the deception under which the defendant had acted, not perhaps designedly, but by acts which had that effect. Knowing facts charging him with knowledge that the defendant signed and intended to sign as surety for him, and by silence and implied authority, having contributed to induce him to again sign in the same character, it is inequitable, in my judgment, for the plaintiff to demand contribution, as much so as if the first note had been taken. His knowledge and acts amount to an authority and a ratification of all that Brown said and did to and with the defendant. It cannot be said in any just or legal sense that the defendant occupied the same relation to Brown that the plaintiff did in respect to this note. Brown had made a firm

note as a partnership agent. When informed of it the plaintiff did not object to the use of the firm name for that purpose, nor to continue his liability in any form which his partner desired, and omitted all precautions calculated to inform the defendant of the true state of facts, and whether intended or not, his conduct was calculated to induce the belief, on the part of the defendant, that he was a principal with Brown, and the change in the form of the note does not, under the circumstances, alter the legal aspect of the case.

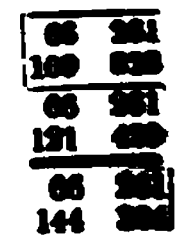
I do not deem it necessary to consider the effect (if any) which should be given to the fact that the money was paid into the firm to the credit of Brown.

I am in favor of affirming the order of the General Term.

All concur.

Order affirmed. Judgment absolute against appellant.

THE NIAGARA FALLS SUSPENSION BRIDGE COMPANY, Appellant, *v.* HENRY BACHMAN, Administrator, etc., Respondent.



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Where the owner of land lays the same out into lots and streets, makes and files a map or plot thereof, and sells and conveys lots by the map bounded upon the streets, as delineated thereon, this does not necessarily, and without other facts, make the streets so laid out public highways.

To constitute a public highway by dedication, there must not only be a setting apart and a surrender to the public use of the land by the owner, but, also, an acceptance and formal opening by the proper authorities, or a user.

The acts and declarations of the landowner must be unmistakable in their purpose, and decisive in their character, showing the intent to dedicate the land absolutely and irrevocably to the public use.

Upon a map, made and filed, of lands in the village of N. F., so laid out, was a statement and reservation as to a portion of the streets and avenues, to the effect that they were laid out not only with reference to public use, but for the use of hydraulic establishments, and the proprietors therefore reserved a discretionary power to direct how much and what part of said streets should be used for canals and races, and what part appropriated to public use. In an action for trespass against the village superintendent, in entering upon a part of a street as to which the reservation applied, cutting down trees, etc., for the purpose

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of opening it as a highway, *held*, that the reservation negatived any intention of dedicating the specified streets and avenues absolutely and irrevocably to the public use, and some further act and declaration by the owners was necessary to a complete donation; that, before the public could acquire any rights or take any easement under the qualified or proposed dedication, the assent and donation of the proprietors was required.

The original map was filed in 1832. In 1861, under the reserved right, a new map was filed, upon which the *locus in quo* was not delineated as a street; up to this time there had been no occupation by any public overt act, or any use as a highway, or any act assuming to recognize or accept any dedication, absolute or qualified, of that part of the street, save a formal resolution of the village trustees declaring the same a public highway; the entry by defendant was after filing the new map. *Held*, that, aside from the reservation, the proprietors had a perfect right to recall the donation, which having been done, the action would lie.

Declarations of plaintiff's treasurer, and one of its directors, consenting to and directing the cutting down of the trees and opening the street were admitted as evidence on the part of defendant, under objection. *Held*, error; that the officer, simply as such, was not authorized to speak for and bind the corporation, and, without further evidence of his authority, his declarations were incompetent.

(Argued April 28, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of defendant, entered upon the report of a referee.

This action was for trespass, alleged to have been committed by Peter D. Bachman, defendant's intestate, who was the original defendant, upon lands of the plaintiff, situate in the village of Niagara Falls.

It was claimed by defendant that the *locus in quo* was a public highway, and that said Bachman, as superintendent of the village, entered thereon, cut down trees, dug up the soil, etc., for the purpose of making and grading the street, which was the trespass complained of.

In 1832, Augustus Porter and Peter B. Porter, being joint owners of lands within the now corporate bounds of said village, lying along the west bank of the Niagara river, caused the same to be laid out into lots, streets and avenues, and

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caused a map thereof to be made and filed. New maps were made and filed in 1834, 1836 and 1861; the proprietors sold the lots, referring to the maps and bounding upon the streets and avenues delineated thereon. Upon the maps of 1836 and 1861 was the following note: "The several streets and avenues laid out in this village, between Main street and the river, and between Buffalo street and the river, have been so laid out by the proprietors, not only with reference to public use and travel, but with reference to the particular use and convenience of hydraulic establishments already erected or which may hereafter be erected. They, therefore, reserve to themselves, their heirs and assigns, a discretionary power to direct how much and what part of said streets and avenues shall be used for canals and races, and how much and what parts thereof appropriated to public use."

On said map of 1861 was an additional note, a portion of which is as follows: "Remark. This map exhibit the changes required to be made by the construction of railroads and hydraulic canal."

Main street referred to ran north and south, parallel with the general course of the river. Between that and the river, and running parallel with Main street, was Canal street. Another street ran east and west, at right angles with Main and Canal, named on the first map Hill street, on the subsequent maps Niagara street; on the maps, prior to 1861, it was laid out as running to the river, on the map of 1861 it was delineated as only extending to Canal street. The *locus in quo* was that portion of said street, as it appeared on the original maps, between Canal street and the river. Prior to the alleged trespass Niagara street, east of Canal, had been opened and worked, the lots adjoining had been sold, houses built thereon, and the street, for over twenty years, had been used as a public highway. Niagara street west of Canal street had never been opened and worked, it was sparsely covered with forest trees, and a high ridge crossed it which had to be graded down to make it passable as a street. In 1861, with the consent of the proprietors, a ditch had been dug by the

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village along the north line of Niagara street, west of Canal, for the purpose of carrying off the water from said street, east of Canal. The lands west of Canal and south of Niagara were inclosed; north of Niagara they were not inclosed but left open to the public. In 1853 the trustees of the village who, by its charter, were commissioners of highways, adopted an ordinance declaring Niagara street to be open as a highway in accordance with the map of 1836, westerly to Water street, a street delineated on said map, west of Canal street and along the bank of the river. By the amended charter of the village of 1866 (§ 7, chap. 149, Laws of 1866) it was declared that all streets, etc., laid down upon the map of 1861 "now open to and used and traveled upon by the public, to the extent" they are so opened and used, should be deemed and were public highways, and whenever any of such streets shall be further opened to the public and such further opening thereof duly accepted by the trustees of said village, and the same as so further opened and adopted shall be by them declared public highways, the same shall to the extent of such further opening and adoption thereupon be deemed and hereby are declared to be thereafter public highways, etc.

In 1867 plaintiff, a corporation incorporated for the purpose of building and maintaining a bridge across the Niagara river by proceedings under its charter acquired title to that portion of the lands so mapped out, lying west of Canal street, including the *locus in quo*. By the order of the court in such proceedings the title acquired was declared to be subject only to the rights of the public in the street passing through the lands described as laid down on the map of 1836, with alterations made in 1861. On June 9, 1868, the village trustees adopted a resolution directing that all obstructions caused by trees standing within the line of Niagara street, between Canal and Water streets, be removed, and that the same be put in condition for use, and by resolution of June 15, 1868, the village superintendent was directed to remove such trees as he might deem necessary. In pursuance of said resolutions said Bachman cut down and carried away several trees, and

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excavated for the purpose of grading the street, which was the trespass complained of.

Upon the trial of the cause the referee allowed defendant to prove, under objections and exceptions, various statements and declarations of Delos De Wolf, plaintiff's treasurer and one of its directors, in substance consenting to the opening of the street and directing defendant and others engaged to go on with the work. Further facts appear in the opinion.

The referee found the *locus in quo* was a public highway, and that Bachman had a right to enter thereon, and do the work necessary to remove obstructions and improve the street.

A. Perry for the appellant. The referee erred in deciding that the strip of land called Niagara street, west of Canal street, was a public highway. (1 R. S., 521, § 100; 3 Kent's Com., 419, 451; Washb. on E. and S., 173 [m. p. 126]; id., 180 [m. p., 133]; *Watt* v. *Trapp*, 2 Rich., 136; *Gibson* v. *Durham*, 3 id., 85; *Carvon* v. *Dozey*, 3 Jones L. R. [N. C.], 23; *Gentleman* v. *Soule*, 32 Ill., 271; *Greene* v. *Chelsea*, 24 Pick., 71; *Child* v. *Chappell*, 9 N. Y., 257; *Holdane* v. *Trustees, etc.*, 21 id., 474; *Carpenter* v. *Gwynn*, 35 Barb., 395; *McMannis* v. *Butler*, 51 id., 436; *Roberts* v. *Karr*, 1 Campb., 262, note; *Lethbridge* v. *Winter*, id., 263; *Comm.* v. *Newbury*, 2 Pick., 51; *Durgin* v. *Lowell*, 3 Al., 398; *Ward* v. *Davis*, 3 Sandf., 502; *Scott* v. *State*, 1 Sneed, 629; *Bissell* v. *N. Y. C. R. R. Co.*, 23 N. Y., 61; *Clements* v. *Village of West Troy*, 16 Barb., 251; *Bowers* v. *Suff. Manuf. Co.*, 4 Cush., 332; *Trustees, etc.*, v. *Otis*, 37 Barb., 50; *Gould* v. *Glass*, 19 id., 179; *Hoole* v. *Attorney-General*, 22 Ala., 190; *Ward* v. *Davis*, 3 Sandf., 502; *City of Oswego* v. *Oswego C. Co.*, 2 Seld., 257; *Underwood* v. *Stuyvesant*, 19 J. R., 186; *Lee* v. *Village of Sandy Hill*, 40 N. Y., 442.) The strip of land was never laid out or dedicated as a highway. (1 R. S., 513, § 55; id., 525, § 125; *Woolsey* v. *Tompkins*, 23 Wend., 324; *Fitch* v. *Comrs., etc.*, 22 Wend., 132; *People* v. *Comrs., etc.*, 27 Barb., 94; *Stewart* v. *Wallis*, 30 id., 344; *People* v. *Hynds*, 30 N. Y., 470; *Miller* v. *Brown*, 56 id., 383; *Christy* v. *Newton*, 60

Barb., 332; *McMannis* v. *Butler*, 51 id., 436.) There has been no express and unequivocal user of the land in question as a street or highway. (40 N. Y., 442; *Wohler* v. *B. and S. L. R. R. Co.*, 416 id., 686; *Wright* v. *Lukey*, 3 Cush., 295.) The superintendent had no power to bind the village. (37 Barb., 50; *State of Maine* v. *Bradley*, 40 Me., 154.) By making and filing the map of 1861 the Porters revoked any dedication which they had intended to make of the *locus in quo*. (40 N. Y., 442; 21 id., 474.) The referee erred in receiving in evidence the declarations of the treasurer and one of plaintiff's directors. (*Soper* v. *B. and R. R. R. Co.*, 19 Barb., 310; *Bk. of Monroe* v. *Field*, 2 Hill, 445; *Ward* v. *Davis*, 3 Sandf., 502; *Marble* v. *Whitney*, 28 N. Y., 397, 307; *Babcock* v. *Lamb*, 1 Cow., 238; 2 R. S., 407, § 8; V. S. Pldgs. 470.)

H. N. Griffith for the respondent. The *locus in quo* was properly held to be a public highway. (*Hunter* v. *Trustees, etc.*, 6 Hill, 411; *Child* v. *Chappell*, 5 Seld., 256; *Bew* v. *Mills*, 21 Wend., 290; 4 Kent., 129, 130, 519; 3 id., 566, note; Ang. on Highways, §§ 141, 142; 2 Greenl. on Ev., § 554; *Clements* v. *West Troy*, 10 How. Pr., 199; *Bissell* v. *N. Y. C. R. R. Co.*, 26 Barb., 634; 23 N. Y., 64; 21 id., 474; 23 Barb., 123; Thompson on Highways, 56, 57; *Hickok* v. *Trustees, etc.*, 41 Barb., 130.)

Per Curiam. The referee has, to a great extent, substituted a statement of the evidence for a report of the facts as required by statute. He has found, as a conclusion of law, that the *locus in quo* was a public highway at the time of the entry, and the removal of the trees and gravel by the intestate, then an overseer of highways; but he has not found any fact from which the conclusion necessarily results. The disputed question of fact was whether a highway legally existed at the place, at the time of the alleged trespass. There was no proof that the land had been appropriated and occupied by the public, by authority of law and without or against the assent

of the owner, as and for a highway. There were no steps taken by the village or town authorities to acquire a title to the property as against the proprietors and subject it to an easement as a public highway under the statutes regulating the laying out and opening highways and public streets. Neither was there any evidence that the *locus in quo*, had at any time been opened or used as a highway, or that the public had acquired an easement by prescription. The referee finds that this part of Niagara street, although open to the public, because not inclosed, had not been opened as a highway, and had not been and could not, in its natural state and as it then was, be used for the ordinary purpose of a highway.

The claim is, that the land had been dedicated by the owner to the public as and for a highway, and that the dedication had been accepted by the proper authorities, and that thus the *locus in quo* had become a public highway, with the assent of the owner and by the act of the public officials. If the evidence, either as reported by the referee or as appearing upon the record, would have justified the finding as a fact such dedication and occupation, the judgment, so far as this point is concerned, may be sustained, notwithstanding the infirmities of the report. Every reasonable intendment may be made in support of a judgment. The evidence and the findings of the referee show that, as between the original proprietors of the land and those to whom conveyances had been made of lands upon the line of what is claimed as a street west of Main street, the latter were entitled to a right of way and a passage. But this was a private right and did not necessarily, and without other facts, make the way a public way, subject to the control of the highway officers, or make its support and maintenance a public charge. If it was a public highway the responsibility for its proper repairs and support was upon the public; and the duty was never assumed or undertaken or attempted, except by the commission of the acts for which this suit is brought. The existence of Niagara street as a public highway east of Canal street was clearly established. It had been used and occupied as a public high-

way, with the assent of the original owner of the land, for many years, and the fact of its absolute surrender to and acceptance by the public was undisputed. The only act of dedication of any part of the street to the public use, other than the acquiescence in its actual use, was the making and filing of a plot of the ground, with the street laid down thereon, by the owner, and the sale and conveyance of lots by the plot and bounded upon the streets as delineated thereon. But upon the maps and plots filed there was an express qualification and reservation of rights in respect to the streets and avenues as laid down between Main street and the river, including the *locus in quo*, and while east of Main street, Niagara street, actually occupied and improved as a highway by the town, and subsequently by the village authorities, was dedicated absolutely, there was no such absolute surrender and dedication to the public use of the streets west of Main street. It was in terms declared, and subject to the declaration grantees accepted their conveyances and the public enjoyed any easement in the premises, that the streets and avenues between Main street and the river had been laid out by the proprietors, not only with reference to public use and travel, but also with reference to the particular use and convenience of the hydraulic establishment existing or thereafter to be erected; and they in terms reserved to themselves, their heirs and assigns a discretionary power to direct how much and what parts of said streets and avenues should be used for canals and races, and how much and what parts thereof appropriated to public use. Under the reserved right, a revised map was filed in 1861, exhibiting the changes made necessary by the construction of railroad and hydraulic canal, and continuing the original reservation, on which map Niagara street is not delineated or laid down as a street. West of Canal street, up to that time, there had been no occupation by any public act, or use, as a highway, or by any act other than a formal resolution of the village trustees, declaring the same a public highway, assuming to recognize and accepting any dedication, absolute or qualified, of this part of the street,

and the proprietors had the perfect right, aside from the reservation, to recall the donation. To constitute a public highway by dedication, there must not only be an absolute dedication, a setting apart and a surrender to the public use of the land by the proprietors, but there must be an acceptance and a formal opening, by the proper authorities or a user. (*Fonda* v. *Borst*, 2 Keyes, 48; S. C., 2 Abb. Ct. of App. Cas., 155; *Holdane* v. *Cold Spring*, 21 N. Y., 474; *Oswego* v. *Oswego Canal Co.*, 2 Seld., 257.) The first act is the dedication, the voluntary donation by the owner of the land, and the public can only accept that which has been donated, and the acceptance must be *secundum formam doni*, and if they cannot take according to that, they cannot take at all. (*Stafford* v. *Coyney*, 7 B. & C., 257; *Poole* v. *Huskinson*, 11 M. & W., 827.) The dedication must be made with intent to dedicate. (*Barraclough* v. *Johnson*, 8 A. & E., 99.) The acts and declarations of the land owner indicating the intent to dedicate his land to the public use must be unmistakable in their purpose and decisive in their character to have the effect of a dedication. (Wash. on Ease., 182.) In this case the owners, by their acts and declarations, negatived the intention of dedicating the *locus in quo*, absolutely and irrevocably, to the public use, and thus destroyed the force and effect usually given to maps and plots of land made under similar circumstances, as evidence of an intent to dedicate, or of an actual dedication of land to the public. The maps and plans, in connection with the explanatory addenda and reservation, do not show a present and actual dedication of any part of the streets and avenues west of Main street. Before the public could acquire any rights or take any easement under the qualified or proposed dedication, and set apart and improve any part of the streets as public highways, the assent and direction of the proprietors was required. Some further act and declaration by the owners was necessary to complete the donation of any part of the lands within the limits mentioned for a public highway. When so donated and occupied, the right of the owners was subject to the public easement and the rights of

the public over the lands so dedicated. The maps and plans, with the explanatory and qualifying notes, taken together look to a future act to constitute a donation or setting apart of the streets, or any part of them, to the public use. The public could only take and occupy such streets as the proprietors should thereafter direct. Until such further act, by the terms of the reservation, the owners reserve to themselves, and their heirs and assigns, the absolute right to control and direct the use of the premises, a power entirely repugnant to, and destructive of, any supposed dedication. The *locus in quo* was not tendered or donated to the public to be occupied and enjoyed at their option, and as they should elect. The bridge company succeeded to and were the grantees, by operation of law, of the original proprietors, and were possessed of all the title to, and interest in, the *locus in quo*, and, as the successors to the title of the original owners, had the right to direct what parts should be used as a public highway. There was no evidence that the public had acquired any right to use, or had used, the *locus in quo* as a highway, or that the proprietors had completed its dedication, by directing what parts should be used by the public prior to the acquisition of the title by the plaintiff. Hence the admissions and declarations of Mr. DeWolf, if authorized to speak for the company, were material, and the referee, as if relying upon his declarations as evidence of a consent that the entire street as laid down upon the map had been dedicated to, and might be taken by, the public for the purposes of a highway, has found his declarations as proved. The admission of such declarations was error. They were not competent and should have been excluded, without further evidence of his authority to represent and bind the plaintiff. The referee has evidently given effect to the declarations, as evidence that the *locus in quo* was a part of the public highway, by the donation and assent of the proprietors, by which that which was left uncertain by the notes upon the maps and plans as to the parts of the street which might be taken and used by the public, had been made certain and definite and the whole street had been dedicated. The error

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was not harmless in view of the effect evidently given the evidence by the referee.

In *Whitney v. Filkins*, in which we are furnished with an opinion in manuscript by Judge DANIELS, a highway existed by prescription through Canal street, as laid down on the map and independent of the dedication now relied upon.

There may be other evidence to establish the existence of a highway and that the intestate was in the lawful discharge of his duties in doing the acts complained of, which, unless the parties conclude that the litigation is profitless and not worth further continuance, may be produced upon another trial. But upon the case made and for want of proof of the dedication of the *locus in quo* as a public street, or other competent evidence establishing the existence of the highway, and for error in admitting in evidence the declarations of Mr. DeWolf against the company, the judgment must be reversed and a new trial granted.

All concur.

Judgment reversed.

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THE NATIONAL BANK OF NEWBURGH, Respondent, *v.* DANIEL SMITH, Appellant.

Where, after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank of an amount sufficient to pay the note, this does not of itself, as between the bank and an indorser, operate as a payment. In the absence of any express agreement or directions, it is optional with the bank whether or not to apply the money in payment; it is under no legal obligation so to do.

(Argued April 28, 1876; decided May 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This action was upon a promissory note made by one

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THOMAS (wrongly) indorsed by defendant and discounted by plaintiff. The note was for $500; it fell due February 17, 1874; was not paid: was duly protested, and notice served on defendant. When the note fell due, George had ten dollars and forty-three cents on deposit in the plaintiff's bank. He deposited $500 March 2, 1874, which was credited to him; no directions were given as to the application thereof. The note was not charged to his account, it being the practice not to so charge unless an account is good for the note at the time it falls due.

On March 4, 1874, another note made by George, payable at plaintiff's bank, and falling due on that day, was presented for payment, was paid by plaintiff, and charged up in George's account.

C. F. Brown for the appellant. An indorser of a promissory note holds, as to the maker, the relation of a surety. (Byles on Bills, 190; 3 Kent's Com., 112; *Wood* v. *Jeff. Co. Bk.*, 9 Cow., 206; *Snyder* v. *Westfall*, 4 Hill, 216; *Griffith* v. *Reed*, 21 Wend., 304; *Nat. Bk. of Fishkill* v. *Speight*, 47 N. Y., 668.) Plaintiff was bound to apply towards the payment of the note in suit all available means under its control. (*Gary* v. *Cannon*, 3 Ire. Eq., 64; *Pratt* v. *Adams*, 7 Paige, 615; *Clark* v. *Ely*, 2 Sandf. Ch., 166; *Wright* v. *Austin*, 56 Barb., 13; *Edson* v. *Dillage*, 17 N. Y., 158; *King* v. *Baldwin*, 2 J. Ch., 554; *Hays* v. *Ward*, 4 id., 123; *Wright* v. *Austin*, 56 Barb., 13; *Ætna Nat. Bk.* v. *Fourth Nat. Bk.*, 46 N. Y., 82, 88; *King* v. *Johnson*, 17 J. R., 384; *Baker* v. *Stackpole*, 9 Cow., 436; 47 N. Y., 668; 2 Pet., 543; *Coml. Bk. of Albany* v. *Hughes*, 17 Wend., 94; *U. S. Bk.* v. *Smith*, 11 Wheat., 171; Pars. on Bills, 436.)

Samuel Hand for the respondent. The deposit of March second was not a payment of the note in suit. (*Kingston Bk.* v. *Gay*, 19 Barb., 459.) It was not, without an actual demand of payment, a legal set-off against the note in suit. (*Downer*

v. *Phœnix Bk.*, 6 Hill, 297; *Payne* v. *Gardner*, 29 N. Y., 146.) It was optional with the bank whether to apply this deposit to the payment of the note in suit. (*Marsh* v. *Oneida Central Bk.*, 34 Barb., 298.) Defendant's liability became fixed by the protest, and could not be discharged by any dealings between the maker and plaintiff which did not deprive defendant of any remedy against the maker on the note. (*Beardsley* v. *Warner*, 6 Wend., 610; *Pitts* v. *Congdon*, 2 Comst., 352; *Hurd* v. *Little*, 12 Mass., 503; *Pring* v. *Clarkson*, 1 B. & C., 14; *Ross* v. *Jones*, U. S. S. C., Sept. 10, 1875.)

Per Curiam. When the note in suit was protested and the liability of the defendant as indorser fixed, there were no funds appropriated for the payment of the same. The general deposit of money afterwards without regard to the note did not, of itself, operate as a payment. On the contrary, as there was no agreement that the money deposited was to be appropriated for such a purpose, the act itself indicates that there was no intention by the depositor or the plaintiff to apply it upon the note. The subsequent disposition of the money, without any objection, confirms the inference that there was no design thus to appropriate it. If such had been the intention no reason exists why a check should not have been given for the amount of the note in suit and the note taken up or at least a charge made for the same upon the maker's account. In the absence of any express directions or an agreement to that effect, it was optional with the bank whether it should apply the money or not upon the note in suit, and it was under no positive legal obligation to do so. (*Marsh* v. *Oneida Central Bank*, 34 Barb., 298; *Pitts* v. *Congdon*, 2 Comst., 352; *Beardsley* v. *Warner*, 6 Wend., 611.)

The question is not presented whether the rights of the parties would have been changed, if the maker of the note had to his credit on account sufficient to meet the note when it matured, and the authorities cited on this subject, therefore, have no application.

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The note having been duly protested and no act done by the plaintiff, which discharged the liability of the indorser, the judgment must be affirmed.

All concur.

Judgment affirmed.

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142 389

KITTIE MERSEREAU, Administratrix, etc., Respondent, *v.* THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellant.

The facts that a person is authorized by a foreign life insurance company to solicit and take applications for insurance, to issue and deliver policies and to receive premiums, and deliver receipts for them, do not, as matters of law, constitute him a general agent of the company, authorized to waive conditions in a policy as to payment of premiums. (CHURCH, Ch. J., ANDREWS and MILLER, JJ., dissenting.)

As to whether, where upon a policy there is indorsed a notice that no agent has authority to receive any premiums without first presenting a receipt signed by the president or secretary of the company, or to alter the policy or receive any premium after it is due, a general agent can waive the condition forfeiting it in case of non-payment of premiums, *quære* (CHURCH, Ch. J., ANDREWS and MILLER, JJ., holding that he can; ALLEN, RAPALLO and EARL, JJ., that he cannot in the absence of evidence that the company has, by direct authority, enlarged his powers, or has knowingly permitted him to act beyond the scope of the power as thus limited; FOLGER, J., not voting).

(Argued March 23, 1876; decided May 30, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was upon a policy of life insurance issued by defendant, a foreign corporation, upon the life of Esdras Shear, husband of plaintiff's intestate.

The policy was issued in 1871; the premiums required to be paid semi-annually, "on or before the thirty-first day of August and February of every year." The policy contained this clause:

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"Second. If the said premiums shall not be paid at the office of the company, in the city of Hartford, Connecticut, or to an agent of the company, on his producing a receipt signed by the president or secretary, on or before the date above mentioned, then, in every such case, the said company shall not be liable for payment of the sum insured, or any part thereof, and this policy shall cease and determine."

On said policy was indorsed a notice to policyholders in the words following, viz.: "The insured will please take notice that no receipt for premium on this policy is valid unless signed by the president or secretary of the company, at Hartford, Connecticut; and that no agent has authority to receive any premium without first presenting a regularly signed receipt from the president or secretary; or to interline, alter or otherwise change any policy, or to receive any premium after date of its being due, without special permission from the officers of the company."

Shear died September 14, 1872. The defence was, that the semi-annual premium due August 31, 1872, was not paid. It was claimed, upon the part of the plaintiff, that the payment was waived by Mr. Weller, an agent of the company at Hudson, in this State. Plaintiff's evidence tended to show that said Weller called upon Shear, who spoke to him about paying the premium, but that Weller stated that he had not the company's receipt, and told Shear to give himself no uneasiness, that he would keep him good with the company. Mr. Weller's authority as agent, as testified to by him, was, to call upon parties and solicit them to insure in his company; to receive their applications, to forward them to the company, through Mr. Bull, the general agent, and when the policy came, to deliver it, and to collect the premium and all subsequent renewal premiums. Upon cross-examination it appeared that, in his advertisements, etc., he held himself out as a general agent.

In reference to the waiver and the agent's authority, the court charged as follows.

"The plaintiff says, true, we did not pay the premium when

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it was due, but you, the company, by your authorized agent, the party whom you authorized us to treat with, the party who was authorized to take the insurance, and to issue and deliver policies and receive premiums, and deliver receipts for them, this agent entered into a solemn agreement with the assured that he would keep him safe, and see that his insurance was kept good with the company. The plaintiff says that Mr. Shear offered, before any default had occurred, to pay that premium which was to become due in the future, that the agent declined to receive it because he had not the renewal receipt of the company with him, without which he was unauthorized to receive premiums, and that Mr. Shear, thereupon, said that he would rather have it settled up now, because he did not want to have the policy run out, whereupon this agent said, 'give yourself no trouble about it, I will see that you are kept all right with the company.' That is the state of facts which the plaintiff asks the jury to believe was sustained by the agent, and she claims that thereby there was a waiver of the condition requiring strict payment by the assured in order to keep the policy good. Now, if you believe that the state of facts alleged by the plaintiff is sustained by the evidence, then, as a matter of law, I charge you that that was a waiver of strict payment made by an authorized agent acting for, and who had a right to act for, this company."

Defendant's counsel excepted, "to that portion of the charge which says, substantially, that if the jury believe the facts, as testified to by the plaintiff's witnesses, those facts constitute a waiver of payment on the part of the defendant, made by an authorized agent."

Further facts appear in the opinions.

Samuel Hand for the appellant. Defendant's agent was not authorized to waive the condition of the policy as to payment of the premium. (*Mech. Bk.* v. *R. R.*, 3 Kern., 634; *Wilson* v. *Gen. Ins. Co.*, 4 id., 418; *Burton* v. *Orient Ins. Co.*, 4 Bosw., 265; *Murdock* v. *Chenan. Ins. Co.*, 2 Comst.,

210; *Catori* v. *Am. L. Ins. Co.*, 33 N. Y., 491; Big L. and Ac. Cas., 336; Bliss on Life Ins., 478; *Busby* v. *L. Ins. Co.*, Md., April, 1874; *Bonton* v. *Am. M. L. Ins. Co.*, 25 Conn., 542.)

R. E. Andrews for the respondent. The waiver by Weller of the payment of the premium was valid and effectual. (*Miller* v. *Phœnix Ins. Co.*, 27 Iowa, 203; 1 Am. R., 262; *O'Reilly* v. *Guar. M. L. Ins. Co.*, 8 Hun, 460; *Ins. Co.* v. *Wilkinson*, 13 Wal., 222; 3 Big., 818; Dunlap's Paley on Ag., 199; *Carroll* v. *C. O. Ins. Co.*, 10 Abb. Pr. [N. S.], 166, 173; *Sheldon* v. *Ct. F. Ins. Co.*, 26 N. Y., 460; *Trustees, etc.* v. *Bklyn F. Ins. Co.*, 19 id., 306; *Tiddle* v. *Market Ins. Co.*, 29 id., 184; *Owen* v. *F. J. S. Ins. Co.*, 57 Barb., 518; *Van Allen* v. *J. S. Ins. Co.*, 4 Hun, 403; *Bklyn F. Ins. Co.* v *Miller*, 12 Wal., 283; 2 Big., 764; *Hotchkiss* v. *Ger. F. Ins. Co.*, 5 Hun, 986; *Dean* v. *Etna L. Ins. Co.*, 4 T. & C., 497; *Bodine, Ex.*, v. *F. Ins. Co.*, 51 N. Y., 117; *Wood* v. *Pough. Ins. Co.*, 32 id., 620; *N. Y. C. Ins. Co* v. *Nat. Prot. Ins. Co.*, 20 Barb., 469; *Rowley* v. *Em. Ins. Co.*, 36 N. Y., 550; *Behen* v. *Wansburgh Ins. Co.*, 35 id., 131; *Whitwell* v. *Put. F. Ins. Co.*, 6 Lans., 166; *Dohn* v. *F. J. S. F. Ins. Co.*, 5 id., 277; *Pitney* v. *G. Ins. Co.*, 61 Barb., 345.)

ALLEN, J. By the terms of the policy the liability of the insurers ceased upon the failure of the insured to pay the renewal premiums at the office of the company at Hartford, or to an agent of the company, on his producing a receipt signed by the president or secretary on or before the days at which they were payable. The premium which became due in August, 1871, was not paid at or before the day, nor has it been paid since. The policy was therefore of no force at the time of the death of the insured, and the insurers are not now liable upon it unless the condition was waived by the company or by an authorized agent. It is not claimed that the company has, by the action of its board of managers, or by its executive or any of its officers, varied the condition

referred to. If its performance has been dispensed with and the policy continued in force notwithstanding the default in the payment, it has been by the act and agency of Weller, the local agent of the insurers at Hudson.

A lax idea seems to prevail, and certainly is persistently urged upon this appeal, that an agent for an insurance company, representing it and transacting business for it at a distance from its principal place of business, is, and must necessarily be a general agent, with full authority to bind his principals in all matters within the territorial bounds of his agency, and it is sought to render void the most solemn and important stipulations of the contract upon this theory. There is no countenance for the doctrine in any well-considered case. Agents of underwriters, at a distance from their principals, are either general or special agents, possessing plenary or limited powers, depending upon the terms of the grant of power or the powers exercised with the assent of the principals; and the extent of their authority is to be determined by the same rules that control in respect to other agencies.

The rule is well expressed in *Insurance Company* v. *Wilkinson* (13 Wall., 222) and *Miller* v. *The Phœnix Insurance Company* (27 Iowa, 203). Insurance companies doing business by agencies at a distance from their principal place of business, are responsible for the acts of the agent, within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge.

It is upon and within this general principle that insurance companies have been held bound by the acts of their agents in dispensing with or varying the terms and conditions of their policies of insurance. (*Insurance Company* v. *Colt*, 20 Wall., 560; *Bodine* v. *Exchange Fire Ins. Co.*, 51 N. Y., 117; *Owen* v. *Farmers' Joint Stock Ins. Co.*, 57 Barb., 519; *Carroll* v. *Charter Oak Ins. Co.*, 10 Abb. [N. S.], 166; *Sheldon* v. *Atlantic Fire and Marine Ins. Co.*, 26 N. Y., 460.)

The actual authority of Weller for the defendant corpora

tion was to solicit insurance, receive and forward applications to the general managers at Albany, and on receipt of the policy to deliver it and collect the premiums, and to collect the renewal premiums when in possession of the receipt of the company, and upon the delivery of the same to the insured. The insured had no reason to suppose, from any dealings with the agent or his transactions with others, that his powers were other or different from those specified. By a notice upon the policy, the authority of the agent in respect to the semi-annual renewal premiums was emphatically and distinctly limited, and he was only authorized to receive them upon previously and regularly signed receipts from the president or secretary. He required a special authority to collect and receive each renewal premium as the same should become payable. His agency in respect to the policy absolutely ceased upon its delivery, and the power was to be renewed and the renewal evidenced by the possession of the specified receipt before he could perform any act on behalf of the company in respect to subsequent payments. The insured had knowledge of this limitation and was estopped from claiming in hostility to it. The precise point was decided by the Court of Errors and Appeals of New Jersey in *Catoir* v. *American Life Insurance and Trust Company* (33 N. J., 487), in which Judge BEDLE, in a well considered opinion, concurred in by the court, asserts, in support of the judgment, the very reasonable doctrine, which is consistent with all the cases, that when the policy itself contains an express limitation upon the power of agents, an agent has no legal right to contract as agent of the company, with the party to whom the policy has been issued, so as to change the terms of the policy or to dispense with the performance of any part of the consideration, either by parol or in writing; and such party is estopped, by accepting the policy, from setting up powers in the agent, at the time, in opposition to limitations and conditions in the policy. These limitations are presumed to continue. In the face of a distinct written expression in the policy of a want of power in the agent, the party suing to recover upon such policy,

has no right to infer the subsequent existence of such power by any uncertain signs. There must be evidence to justify the belief that the company, by direct authority, enlarged the powers of the agent, or that they knowingly permitted him to act for them beyond the scope of the powers originally conferred. In that, as in this case, the authority of the agent to receive payment of the renewal premiums was limited by the statement that the payment was not to be valid except upon the presentation of a receipt under the seal of the company. There was evidence in that case of the possession of the receipt by the agent and tending to show that he gave credit for or received the payment of the renewal premium at the day, and the act was held *ultra vires* and not obligatory upon the corporation. See also, to the same effect, *Bouton* v. *American Mutual Life Insurance Company* (25 Conn., 542).

Unless we are prepared to hold that insurance companies cannot restrict the authority of their agents and that conditions imposing restrictions and limitations upon their powers, and communicated to those to whom policies are issued, are meaningless and but waste paper and may be utterly disregarded, there was no waiver of the condition in this case and the policy expired upon the failure of the insured to pay at the day. This conclusion renders it unnecessary to consider the very serious question whether, upon the most favorable construction of the evidence, there was any waiver or attempt at a waiver of the conditions.

The judgment must be reversed and a new trial granted.

FOLGER, J. This is an action on a policy of life insurance. It is resisted on the ground that there was a failure to pay a premium which fell due before the death of the insured.

It is conceded that the premium was not paid, but it is claimed that payment on the day was waived. This waiver, it was contended, was made by one Weller, an agent of the company.

I am not prepared to admit that the testimony showed

Dissenting opinion, per MILLER, J.

Weller an agent of the company with such power and authority as that he could waive the condition of payment of premium contained in the policy. It is not needful to pass upon that now. But the facts put to the jury, in the charge, as sufficient, as matter of law, to make him a general agent, were not enough for that purpose. The exception to the charge covers that portion of it just noticed.

For the error in the charge, there should be a reversal and a new trial.

MILLER, J. (dissenting). One of the conditions of the policy of insurance upon which this action is brought was, that if the premiums were not paid at the office of the company, or to an agent, on his producing a receipt signed by the president or secretary, on or before the date mentioned therein, the company should not be liable. On that policy a notice was indorsed that no agent had authority to receive any premium without first presenting a regular receipt from the president and secretary, or to alter any policy, or to receive any premium after it became due.

It is insisted by the appellant's counsel that the policy having lapsed, by non-payment of the premium, there was no evidence of any legal waiver of such payment. The waiver depends upon the effect and validity of the arrangement made between the agent of the defendant and the deceased. The testimony shows that Weller was an agent of the company, that his duty was to solicit insurance, receive applications, forward them to the company, receive and deliver policies, collect premiums and all subsequent renewals; that, in connection with his partner, he issued printed circulars as to premiums becoming due, signed by them as general agents; and himself signed as general agent, and he testified that he held himself out as such — the general agent — to persons with whom he dealt for the company.

There was evidence to show that Weller had an interview, before the premium became due, with the deceased, who offered to settle up for the next premium becoming due, and

Weller said he had not got the company's receipt, that the deceased need not give himself any uneasiness about it, that he would be there in time, but if he was not he would keep him good with the company and would not allow the policy to run out. The facts and circumstances proved sufficiently establish that Weller acted as a general agent of the defendant, and were, I think, sufficient to authorize the jury to arrive at such a conclusion.

There has been a uniform current of authority in this State in favor of the rule that a general agent has a right to waive the written conditions of a policy of insurance. In *The First Baptist Church* v. *The Brooklyn Fire Insurance Company* (19 N. Y., 305) it is held that a condition that no insurance shall be binding until the actual payment of the premium and the written acknowledgment thereof, does not invalidate a subsequent contract, by parol, to renew such insurance for a premium not paid at the time the risk attaches but postponed to a future day. This case sustains the general principle that a written condition may be waived by parol.

In *Sheldon* v. *The Atlantic and Marine Fire Insurance Company* (26 N. Y., 460) the insured called upon an agent at Rome, New York, and applied for insurance; the agent being absent he left his application with a clerk in the office, and offered to pay the premium; this was declined by the clerk, who stated that the insured might bring it at some future time, or they would send for it. The policy was sent by mail to the applicant, with a statement that the premium charged was higher than usual, and requesting him to return the policy if he declined, or if he retained it, to send the premium by mail. The property was burned; and, after this occurrence, letters were written by the agent threatening to cancel the policy unless the premium was paid. One of the conditions of the policy was that no insurance should be binding until the actual payment of the premium. It was held that there was a waiver of the prepayment, and that the policy became effectual upon the assured retaining and accepting it, or, at all events, that the question should have been submitted to the

jury. As will be seen the agent had no special powers which authorized him to waive the cancellation, and there was no evidence to show a general authority to act — in this respect his authority differing from the case at bar. EMMOTT, J., says: "There can be no dispute that Lewis could waive the actual prepayment of the premium; he was a general agent of this company, and whatever may have been his secret instructions the insured had a right to rely upon his acts; his principals were bound as well by a waiver of his part of the condition of prepayment of the premiums as by his contracts of insurance." Much more had the deceased a right to rely upon the acts of the agent here to bind his principals, where the proof of a general agency was clear and unequivocal.

In *Carroll* v. *Charter Oak Insurance Company* (10 Abb. [N. S.], 166) the policy contained a provision that in case of other insurance, not notified to defendant and indorsed upon the policy, the policy should be void; also, that the company would not be bound by an instrument, record or statement not referred to or contained in the policy, and that no condition of the policy should be waived except in writing, signed by the secretary. It was held: First. That the receipt, through their general agent, of renewal premiums, taken by him with knowledge of other insurance on the same property, was a waiver of the requirement. Second. That a waiver of a stipulation in a written contract may be shown by parol, notwithstanding the contract requires a writing.

The general doctrine is laid down that forfeitures of all kinds may be waived, and some of the cases are reviewed. Among others is *Goit* v. *National Protection Insurance Company* (25 Barb., 189), where it was held that a general agent of the company, empowered to make contracts of insurance in a given form, may bind the principals by waiving payment of the premium where it is a condition precedent. ALLEN, J., who wrote the opinion, says that a waiver may be by the managers of the company or its duly authorized agent. He adds: "The agent was the general agent of the company to make contracts of insurance in a given form, and so long as

he confined his acts to matters of his agency, his principals were bound. Proof of this waiver did not tend to vary the terms of the contract."

In *Shearman* v. *The Niagara Fire Insurance Company* (46 N. Y., 526) the policy contained a clause that if the property was sold or transferred, or any change took place in the title or possession, without the consent of the company, it would be void. The property was transferred on the fourth of March; the policy renewed on the twenty-first of March, and transferred to plaintiff April fifteenth; on the same day, defendant's agent consented to a transfer of the policy. It was held that a condition of forfeiture may be waived, and the policy revived by any act from which the consent of the underwriters may be inferred.

In *Bodine* v. *The Exchange Fire Insurance Company* (51 N. Y., 117) it was held that a condition in a policy of insurance that no insurance, whether original or continued, shall be considered as binding until the actual payment of the premium, may be waived by the company or its authorized agent, and his waiver may be shown by direct proof that credit was given, or may be inferred from circumstances. The waiver here was made by the clerk of a local insurance agent. After citing the cases already referred to, and others, EARL, C., says: "We must infer that John Whelp had all the power of *ordinary insurance agents.* He had acted for this company for nine or ten years in procuring risks for it, and in delivering policies and renewal certificates. His name was indorsed on the original policy as the company's agent. It was, therefore, according to the decisions above cited, just as competent for him to waive the condition of prepayment as for any other officer or agent of the company. * * * If the agent or his clerk waive the prepayment of premiums, without authority from the company, it can lose nothing, as the agent becomes responsible for the amount of the premiums, as if the same had been paid to him in cash."

The agent in the case last cited had not performed any greater duties than the agent in the case at bar. He

was but an "*ordinary* insurance" agent, while here the agent acted as a general agent, claimed to be such, and his name was signed as a general agent, thus making out a far stronger case. Besides, it was the agent's clerk in the case last cited, and not the agent himself, who waived the payment of the premiums. If an agent's clerk, under such circumstances, can waive a condition of this character, can it be doubted that a general agent has power to do so? It is the nature of a general agency that the agent has all the powers of the principal. (Dunlap's Paley's Agency, 199.) Applying this principle to the case considered; it is evident that the agent did not exceed his authority. The cases cited show, beyond any question, that an act of this character was within the scope of his authority; and, with proof of acts as general agent, and the testimony of the agent that he was such general agent, the evidence is entirely conclusive to establish that fact. The presumption, in the absence of any proof to contradict the evidence of agency, is also in the same direction, and, as the case stood, the defendant was bound to rebut that presumption if he claimed that the evidence was insufficient.

It is no answer to say that his own representation of power would not enlarge it when he was apparently acting within the scope of his authority, and the proof shows that, in fact, he was a general agent. Nor is there any ground for claiming that his powers were limited, without evidence to show the limitation, after the proof was given that he was a general agent. The notice in the policy that an agent had no right to alter any policy, or receive any premium after it became due, does not change the aspect of the case if the agent had a right to waive the condition referred to, as the notice was indorsed in pursuance of that condition. If the condition was waived, the notice was of no effect.

The principle laid down in the cases cited is also supported by numerous cases in the Supreme Court. (*Dohn* v. *The Farmers' Joint Stock Ins. Co.*, 5 Lans., 275; *Dean* v. *The Ætna Life Ins. Co.*, 4 N. Y. S. C., 497; *Whitwell* v. *Put. Fire Ins. Co.*, 6 Lans., 166; *Cone* v. *Niag. Fire Ins. Co.*,

3 N. Y. S. C., 33, affirmed on appeal in this court; *Hotchkiss* v. *Ger. Fire Ins. Co.*, 5 Hun, 90.)

The case of *Bush* v. *Westchester Insurance Company*, recently decided in this court, has no application to the question whether an agent can waive a condition of the character of that presented in this case; nor can the decisions of other States affect the question so well settled by authority in our own courts. The claim that the agreement made was a one-sided promise, without consideration, is not well founded. There was as much consideration for the agreement to waive as in any of the cases cited *supra*. There was the element of estoppel in the case, for the insured was ready and willing to pay, and, by the agreement of the agent, he was induced to forego his rights and omit the performance, on his part, of the conditions of the policy. The waiver was based on the conduct of the defendant's agent at a time when the insured could have complied with the condition. (*Underwood* v. *Farmers' Joint Stock Ins. Co.*, 57 N. Y., 500, and authorities cited.) In this respect the case differs from that last cited.

The notice sent to the insured by mail was intended to advise parties when the payments became due. It was, at most, a circular issued by the agent's clerk, without the knowledge of the agent, and was not, by its terms, a waiver or a revocation of the agreement; nor was the agreement of the agent purely personal and in his own behalf alone. It was the act of Weller as agent, within the scope of his agency, on behalf of the company. It was the policy of the company which was the subject-matter of the contract, and in reference to that which Weller, as its general agent, undertook to waive the payment of the premium.

The exception to a portion of the charge of the judge was not well taken. The exception, as stated in the case, was to that portion of the charge in which the judge says, substantially, that if the jury believe the facts as testified by the plaintiff's witnesses, those facts constitute a waiver of payment on the part of the defendant by an authorized agent. The portion

of the charge excepted to was not in the precise language stated. The judge, after stating the plaintiff's evidence on the subject, proceeded to say that this was the state of facts which the plaintiff asked the jury to believe, and that if they believed that this state of facts was sustained by the evidence, then, as a matter of law, there was a waiver of strict payment made by an authorized agent of, acting for, and who had a right to act for, this company. He then proceeded to state the defendant's evidence, leaving it for the jury to determine how the fact was. I am unable to discover any error in the charge; and if the facts proved by the plaintiff were true, then the plaintiff was entitled to recover. A point is made that he left out of view the fact, which the jury might have found from the plaintiff's evidence, that Weller acted on his own responsibility, and that the plaintiff relied upon his personal undertaking to keep the premium good with the company. The answer to this position is, that no such point was taken on the trial, and if it had been, the evidence clearly showed that Weller acted as the agent of the company. If it was relied upon, the attention of the judge should have been called to the subject, and the judge requested to charge in regard to the same. As this was not done, it is too late now to raise the question. It is also said that the judge left out of view the rescission of the contract. He charged explicitly on that subject in a subsequent portion of the charge, and no exception was taken thereto. If further instructions were desired, a request should have been made to that effect.

There was no error, and the judgment should be affirmed, with costs.

For reversal: ALLEN, RAPALLO, FOLGER and EARL, JJ., all concurring with FOLGER, J. RAPALLO and EARL, JJ., concurring with ALLEN, J.

For affirmance: CHURCH, Ch. J., ANDREWS and MILLER, JJ.

Judgment reversed.

Statement of case.

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PELETIAH J. MARSH et al., Appellants, *v.* WILLIAM A. RUSSELL et al., Respondents.

The business of furnishing recruits during the war of the rebellion was a lawful one, and the members of a partnership formed for that purpose had a right to agree, in their articles of copartnership, that they would not come in competition with each other, or furnish recruits for less than a price fixed.

Such an agreement can only be condemned on proof that it was made as part of a conspiracy to control prices or create a monopoly, and so against public policy, or that it was made for some other unlawful purpose.

Plaintiffs and defendants entered into a contract that if they, or either of them, should make a contract with any town or towns of the county of W. to furnish recruits, they would share equally in the profits and losses of the business; and that, without the consent of all, they, or either of them, would make no contract for a less sum than $500 per man. In an action for an accounting, *held*, that the contract made the parties thereto copartners, and that it was not void, *per se*, as against public policy.

Gulick v. *Ward* (5 Halst., 87); *Gardiner* v. *Morse* (25 Me., 140); *Doolin* v. *Ward* (6 J. R., 194); *Atcheson* v. *Mallin* (43 N. Y., 147); *Hooker* v. *Van Dewater* (4 Den., 349); *Stanton* v. *Allen* (5 id., 434) distinguished.

Marsh v. *Russell* (2 Lans., 340) overruled.

(Argued May 22, 1876; decided May 30, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of defendants, entered upon the report of a referee.

This action was for an accounting as between copartners.

The complaint set forth the following contract:

"It is hereby understood and agreed, by and between the undersigned, that if the undersigned, or either of them, shall make a contract with one or more towns in Washington county, N. Y., to fill the quota of such town or towns, under an anticipated call of the government for volunteers, for a sum not less than five hundred dollars per man, *that all gains* or profits which may accrue in *such business* shall be divided

equally, share and share alike, between the undersigned, and that all losses shall be paid equally by them. It is further understood and agreed that the undersigned, or either of them, shall make no agreement to furnish the quota of any town for a less sum than five hundred dollars per man, without the consent of all the undersigned. That if two or more towns shall be contracted with to furnish their respective quotas for five hundred dollars per man, or more, by the undersigned, then, and in that case, it is hereby understood and agreed that the undersigned shall furnish eighteen men, or whatever the quota of the town of Hebron may be, at the rate of four hundred dollars per man.

June 18, 1864.

(Signed) WM. A. RUSSELL.
H. R. COWAN.
A. M. BATES.
P. J. MARSH."

And alleged, in substance, that the parties thereto furnished recruits under said contract, making large profits, which were received by defendants, who refused to account, etc.

Upon the trial, and before any other proceedings were had, the defendants' counsel moved to dismiss the complaint, upon the ground that the same did not contain facts sufficient to constitute a cause of action. Plaintiffs' counsel offered to prove that the contract set forth in the complaint was not made by the parties thereto with intent to prevent competition in supplying recruits, or with the intention of raising the price of recruits, but was made for the purpose of preventing the parties to the contract from binding the partnership thereby created from furnishing recruits for an insufficient and unprofitable consideration; that the towns were not confined to filling quotas by contract with other parties, but were at liberty to employ such agents as they saw fit, on such terms as they chose, or to make bargains directly with recruits themselves; that, from a period long prior to the execution of the said contract to a period considerably subsequent thereto, the price of recruits was constantly and uniformly

rising; that, soon after the execution of said contract, the price of recruits ran up to an amount more than double the consideration per man therein mentioned, and that said contract did have and could have no effect in raising such price; and also to prove that a large number of men in Troy, in Rensselaer and Washington counties, as well as in other parts of the State, were engaged in the business of furnishing recruits and filling quotas, and that the parties to said contract did not, and could not, create any monopoly of that business.

To this the defendants' counsel objected upon the grounds, among others, that the intent and purpose of the contract was manifest upon its face; that the necessary effect of it was to prevent competition between the parties to it.

The referee overruled the offer and sustained the objection, to which the plaintiffs' counsel duly excepted.

The referee granted the motion to dismiss, to which the plaintiffs' counsel duly excepted.

Esek Cowen for the appellants. The contract was not void as being against public policy, or for any other reason. (*Stanton* v. *Allen*, 5 Den., 434; *Hooker* v. *Van Dewater*, 4 id., 349.) Whether or not the object of the contract was to raise the price of recruits was a question of fact, to be determined upon all the circumstances of the case. (*Phippen* v. *Stickney*, 3 Metc., 384.) The invalidity of the contract would be no answer to this action. (*Tenant* v. *Elliott*, 1 B. & P., 3; *Farmer* v. *Russell*, id., 296; *Sharp* v. *Taylor*, 2 Ph. Ch., 801.)

Nathaniel C. Moak for the respondents. The contract in question was against public policy, and void, and the complaint was properly dismissed. (*Marsh* v. *Russell*, 2 Lans., 340; *Skeels* v. *Phillips*, 54 Ill., 309; *Atcheson* v. *Mallon*, 43 N. Y., 147; *Stanton* v. *Allen*, 5 Den., 434; *Wilbur* v. *Howe*, 8 J. R., 444; *Hooker* v. *Van Dewater*, 4 Den., 349; *Swan* v. *Chorpenning*, 20 Cal., 482; *Doolin* v. *Ward*, 6 J. R., 194; *Gardiner* v. *Morse*, 25 Me., 140; *Gulick* v. *Ward*, 5 Halst., 87; *Sayre* v. *Louisville Assn.*, 1 Duv. [Ky.], 143; *Hoggan*

v. *Wardlaw*, 8 Bro. P. C. [Tomlin's ed.], 281; *Noyes* v. *Day*, 14 Vt., 384; *Easton* v. *Mavokinney*, 37 Iowa, 601; *Dudley* v. *Odorn*, 5 S. C. R. [N. S.], 131; *Sharp* v. *Wright*, 35 Barb., 236; *Thompson* v. *Davis*, 13 J. R., 115.) Plaintiffs' offer to prove the intent of the parties to the contract, and its effect, was properly overruled. (*Bettinger* v. *Bridenbecker*, 63 Barb., 395; *Atcheson* v. *Mallon*, 43 N. Y., 147.) The illegality appearing on the face of plaintiffs' case, they were properly nonsuited. (66 Barb., 539.)

EARL, J. The complaint was dismissed upon the ground that the contract set out therein was upon its face against public policy, and therefore void; the claim on the part of the defendants being that the necessary and direct effect of the contract was to prevent competition between the parties thereto in furnishing recruits.

The contract made the parties thereto partners in furnishing recruits for the towns of Washington county. They were to be jointly interested in the business and to share equally in the profits and losses thereof. As regulations of their business, they provided that the individual contracts of the members of the firm should inure to the benefit of the firm and that no contracts to furnish recruits should be made for a less sum than $500 for each recruit. It does not appear that the parties had control of any recruits, much less that they had a monopoly of them, or that the towns were in any way obliged to get their recruits from them, or that the price charged was an unreasonable or unusual price, or that the parties did or could, by their contract, put up the price of recruits or embarrass the towns in filling their quotas, or that the agreement was kept a secret. It is not a necessary inference from the terms of the contract that the purpose of the parties was an improper or unlawful one, or that its effect would be to thwart the policy of any law or to injure or jeopardize any public interest.

The business of furnishing recruits was a lawful one, and

could be carried on by individuals or firms; when carried on by a firm its members could regulate the price at which they would buy and sell, as they could if they had been dealers in other articles having a price. Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their articles of copartnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price nor sold for less than a certain other price? Such an agreement would, certainly, not upon its face, be unlawful, and could only be condemned by proof that it was part of a conspiracy to control prices or create a monopoly, or that it was made for some other unlawful purpose.

Our attention has been called to no case in conflict with these views. In *Gulick* v. *Ward* (5 Halst., 87), *Gardiner* v. *Morse* (25 Maine, 140), *Doolin* v. *Ward* (6 Johns., 194), and other cases cited, there were agreements to prevent competition at auction sales made by public officers or in pursuance of law of property which was required to be sold to the highest bidders, and hence the agreements were held to be against public policy and void. At such sales firms may bid as well as individuals, and if the firms are formed for the honest purpose of carrying on a joint business, it matters not that the incidental effect may be to diminish the number of bidders. If, however, the primary object of the firm is to prevent competition then it might be considered as against public policy. In *Atcheson* v. *Mallin* (43 N. Y., 147) the general rule was laid down that when a contract for the performance of any public service or work is to be awarded to the bidder therefor offering terms most favorable to the public, any agreement between parties, designing to make bids, tending either directly or indirectly to restrain or lessen rivalry and competition between them, is void as against public policy; even although it may not appear that such agreement did really produce any result detrimental to the public interest. In that case, however, FOLGER, J., stated that: "A joint proposal, the result of honest co-operation, though it might

prevent the rivalry of the parties and thus lessen competition, is not forbidden by public policy." In that case a board of town auditors were by statute authorized to receive sealed proposals for the collection of the taxes to be assessed on the town and to award the collection of the taxes to the person who should propose to collect the same on terms most favorable to the town; and it was held that an agreement between two persons, each sending in distinct sealed proposals that if the collection should be awarded to either both should share equally in the profits, if any, and contribute equally to the losses, was against public policy and void. It was held that the natural tendency and necessary operation of such an agreement was to prevent rivalry and competition. That case differs in some of its essential features from this. There was a case where the public officers were bound to let the contract to the lowest bidder, and they had not the option to seek contractors wherever they could find them; and in such cases agreements tending to prevent competition among bidders are scrutinized by the courts more closely than in other cases. Then, again, there could be no apparent purpose for such an agreement except to prevent competition between the parties thereto. The collection of the taxes was a business requiring no capital and no great labor or skill; it was a business usually, if not necessarily, conducted by one person. Both parties put in bids, each knowing the bid of the other; and thus, while there was apparent, there was no real competition, and the public officers and others could thus be deceived. That case is not, therefore, a controlling authority for defendants in this case.

In *Hooker* v. *Van Dewater* (4 Denio, 349) and *Stanton* v. *Allen* (5 id., 434), there were combinations between owners of canal boats, expressly and primarily, to regulate the price of freights on the canals, and the manifest purpose of the agreement made was to prevent competition between the public carriers upon the canals; and the agreements were properly held void, as against public policy.

The true rule is laid down in *Phippen* v. *Stickney* (3 Met.,

384), where it was held that an agreement between A and B that A will permit B to become the purchaser of certain property about to be offered for sale at public auction, and that A shall participate with B in the benefits of the purchase, was not upon its face fraudulent, but would or would not be so, as the circumstances of the case showed innocence of intention or a fraudulent purpose in making such agreement. DEWEY, J., says: "When such an agreement is made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article offered for sale, below the fair market value, it will be illegal and may be avoided as between the parties, as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose but for the mutual convenience of the parties and for a reasonable and honest purpose, such agreement will be valid and binding." So here, if it could be shown that this agreement was made by the parties for the purpose of perpetrating frauds upon the towns of Washington county and compelling them, by preventing competition, to pay an enhanced price for recruits, and not for the honest purpose of carrying on a legitimate enterprise in an honest way, it would be brought within the cases cited by the learned counsel for the defendants and would be considered as against public policy.

Therefore, without considering the claim made on behalf of the plaintiff, that whether the contract was or was not void originally, they can recover because it has been executed, enough has been written to show that the judgment must be reversed.

Judgment reversed and new trial granted.

All concur; FOLGER, J., concurring in result; MILLER, J., not voting.

Judgment reversed.

Statement of case.

ANDREW SMITH, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

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A municipal corporation can only be made liable for damages resulting from the overflow of a sewer upon proof of some fault or neglect upon its part, either in the construction of the sewer or in keeping it in proper repair.

In case there is no fault in the construction of the sewer, and the damage is caused by any obstruction therein, it is necessary to show neglect to remove the obstruction after notice of its existence, or some omission of duty upon the part of the municipal officers in looking after it and preventing obstructions.

During, or just after, an unusually heavy shower, a sewer in one of defendant's streets overflowed and flooded plaintiff's premises. In an action to recover damages, it appeared that the overflow was caused by a stoppage of the sewer with sand, etc., washed in from the streets. There was no proof of any prior obstruction, or of any defect in the construction of the sewer. *Held*, defendant was not liable.

(Argued May 22, 1876; decided May 30, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of defendant, entered upon a verdict. (Reported below, 4 Hun, 637.)

This action was brought to recover damages alleged to have been sustained by plaintiff by reason of the stoppage and overflow of a sewer in one of defendant's streets, flooding plaintiff's premises.

The referee found, in substance, that the overflowing of the sewer and flooding of plaintiff's premises was caused by the stoppage of the sewer with sand, dirt and refuse matters washed in from the streets; that at, or just before, the time of the overflow there was an unusually heavy shower; that there was no proof of any knowledge, on the part of the defendant, of any defect or bad condition of the sewer prior to the occurrence, or of any notice to it of such condition.

Further facts appear in the opinion.

Henry Parsons for the appellant. No notice to defendant of the defective condition of its sewers was necessary to fix its liability for damages caused thereby. (*McCarthy* v. *Syracuse*, 46 N. Y., 197.)

D. J. Dean for the respondent. The obstruction not having been occasioned by any act or neglect of defendant, it is not liable without notice, actual or constructive. (S. & R. on Neg., § 147; *Hunt* v. *Brooklyn*, 36 Barb., 226; *McGinty* v. *Mayor*, 5 Duer, 674; *Mayor* v. *Sheffield*, 4 Wal., 189; *Griffin* v. *Mayor*, 9 N. Y., 456; *Huson* v. *Mayor*, id., 163.)

ALLEN, J. The defendants can only be made responsible to the plaintiff for the damage sustained by him by reason of the overflow of the sewer into his cellar and upon his premises, upon proof of some fault or neglect on their part, either in the construction of the sewer or in keeping it in proper repair. It is claimed that there is some evidence that the sewer was not properly graded, but the evidence is very slight, and the referee has not found the fact, nor was he requested to find that the sewer was not of proper dimensions, well and properly constructed and upon the right grade. We are not at liberty to consider any facts except those found by him. It is found upon sufficient evidence that the overflow was caused by a stoppage of the sewer with sand, dirt and refuse matter washed in from the street, and that at or just before the flooding of the plaintiff's premises, there was an unusually heavy shower of rain. There is no proof of any obstruction before that time. There being no fault in the construction of the sewer, causing the overflow, it was incumbent upon the plaintiff to show a neglect by the defendants to remove the obstruction after notice of its existence, or some omission of duty on the part of the city officers in looking after it and seeing that no obstruction occurred. There was no evidence and there is no finding that the sewer was liable to become obstructed under ordinary circumstances, so as to require the watch and care of the officials to prevent its becoming filled

Statement of case.

and choked with the wash of the street, or that it had been obstructed for any time and under circumstances from which it might be assumed that the officers of the city did know, or ought to have known the fact. The city does not insure the citizen against damage from works of its construction, but is only liable, as other proprietors, for negligence or willful misconduct. The principles upon which municipal corporations are held liable for damages occasioned by defects in streets and sewers and other public works, are well settled by numerous cases, and the liability is made to rest, in any case, upon some neglect or omission of duty. (*Barton* v. *Syracuse*, 37 Barb., 292; S. C., 36 N. Y., 54; *Griffin* v. *Mayor, etc., of New York*, 5 Seld., 456; *McCarthy* v. *Syracuse*, 46 N. Y., 194; *Nims* v. *Troy*, 59 id., 500.)

The plaintiff failed to make a case entitling him to recovery, and the judgment must be affirmed.

All concur.

Judgment affirmed.

JOHN MURPHY et al., Respondents, *v.* LOUIS BUCKMAN, Appellant.

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By the terms of a building contract between defendant, owner, and B., contractor, it was provided that if, during the progress of the work, the contractor refused or neglected to supply sufficient materials or workmen, defendant, after three days' notice, might provide them to finish the work, and deduct the expense from the amount of the contract. Defendant, on the default of B., gave the three days' notice, and thereafter expended, in labor and material, to complete the work, a sum, which, with the amount paid B., was $778.90 less than the contract-price. In an action to foreclose a mechanic's lien for materials for the building sold B., *held*, that defendant, by electing to go on under said clause in the contract, waived the right to insist upon a forfeiture, and that plaintiff was entitled to judgment for the balance unpaid.

(Argued May 23, 1876; decided May 30, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York

Statement of case.

affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to foreclose a mechanic's lien on premises in the city of New York.

The referee found, substantially, the following facts, among others: On the 15th of April, 1870, the defendant, Louis Buckman, as owner, and one Frederick Brassel, as mason, entered into a contract, in writing, by which said Brassel agreed, on or before the first of August then next, to do the work and furnish the materials mentioned in the mason's specifications for a building upon defendant's premises, No. 67 Columbia street, in the city of New York, for the sum of $6,000 The contract contained this provision: "Should the contractor, at any time during the progress of the said work refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen, after three days' notice, in writing, being given to finish the said works, and the expense shall be deducted from the amount of the contract."

Brassel entered upon the contract, but ceased work in July, at which time his contract was not nearly completed. Defendant elected to complete the contract himself, as provided in the contract, and served upon Brassel the three days' notice required thereby. Defendant paid to Brassel $3,118.90, and he expended in completing the work contracted for $2,102.20.

Plaintiff furnished to Brassel building materials to the amount of $1,663.98, most of which was used in the work on the building, for which the plaintiff filed a mechanic's lien. As conclusion of law, the referee found that plaintiff was entitled to enforce his lien to the extent of the balance unpaid on the contract.

Further facts appear in the opinion.

Geo. W. Wingate for the appellant. Abandoning the building without full performance was a bar to a recovery. (*Cunningham* v. *Jones*, 20 N. Y., 486; *Smith* v .*Brady*, 17 id., 186, 187, 190; *Crane* v. *Knubel*, 43 How. Pr., 389; *Glacius*

v. *Black*, 50 N. Y., 145, 148; *Pollen* v. *Corning*, 9 id., 93.) There was nothing in the proof to constitute a legal waiver. (*Ripley* v. *Ætna Ins. Co.*, 30 N. Y., 136; *Gardner* v. *Clark*, 21 id., 404; *Roberts* v. *Opdyke*, 40 id., 264; *Pike* v. *Butler*, 4 id., 360; *Catlin* v. *Tobias*, 26 id., 217; *Miller* v. *Pondcar*, 55 id., 325; *Barton* v. *Herman*, 11 Abb. Pr. [N. S.], 383.) The presence of the owner while the work was being done did not affect the case. (*Pike* v. *Butler*, 4 Comst., 360, 363; *Moulton* v. *McOwen*, 103 Mass., 587, 596, 597; *Meehan* v. *Williams*, 2 Daly, 376; *Robinson* v. *Brien*, 20 Tex., 438; *People ex rel. Comrs.* v. *Cowner*, 46 Barb., 334; *Veasie* v. *Bangs*, 51 Me., 509; *Stewart* v. *Fulton*, 31 Mo., 59; *Morrison* v. *Cummings*, 26 Vt., 486; *Reed* v. *Bd. Education*, 4 Abb. Ct. App. Dec., 26.) There was nothing due on the contract against which plaintiff could enforce a lien. (*Crane* v. *Genin*, 60 N. Y., 129; *Lynn* v. *O'Hara*, 2 E. D. S., 560; *Hoyt* v. *Miner*, 7 Hill, 525; *Smith* v. *Coe*, 2 Hilt., 365, 387; *Doughty* v. *Develin*, 1 E. D. S., 625.) The contractor was bound by the contract to do the work "to the satisfaction of the owner." (*Martin* v. *Leggett*, 4 E. D. S., 255; *Thomas* v. *Fleury*, 26 N. Y., 26; *Smith* v. *Briggs*, 3 Den., 73; *McCarren* v. *McNulty*, 7 Gray [Mass.], 39.)

Nelson Smith for the respondents. Defendant was estopped from objecting to the work done by the contractor, he having, by superintending and directing it, waived his right to object to it. (*Gillen* v. *Hubbard*, 2 Hilt., 303; Bigelow on Estop., 501.)

ANDREWS, J. The defendant, on the default of the contractor, elected to proceed to complete the house under the clause in the contract which provides that if the contractor should at any time during the progress of the work refuse or neglect to supply a sufficiency of materials or workmen, the owner may, after three days' notice being given to the contractor, provide them, and deduct the expense from the amount of the contract. The owner gave the notice, and expended in completing the house $2,102.20, which, together

with the amonnt he had paid the contractor, was $778.90 less than the sum the contractor was to receive under the contract; and this sum was allowed to the plaintiffs upon their lien.

The defendant, by electing to go on under this clause of the contract, waived the right to insist upon a forfeiture for the failure of the contractor to perform the contract. The owner was not precluded thereafter from claiming damages against the contractor for defective performance, or for failure on his part to complete the building at the time specified; and these damages he could recoup, against any sum due the contractor, for work done under the contract. But he could not avail himself of the right, given him by the contract, to complete the work, thereby substituting himself in place of the contractor, and at the same time claim that the contract was at an end, and refuse to account to the contractor for work done under it, on the ground that the contract was forfeited. The election to do the work at the contractor's expense, under the clause referred to, assumed that the contract was then in force. The case of *Gillen* v. *Hubbard* (2 Hilton, 304), a case arising under a similar contract, contains a very satisfactory exposition of the meaning of this clause.

This disposes of the main question in this case. The answer did not seek to recoup damages for the contractor's default in performing his contract. The referee found that there was a failure in several respects, by the contractor, to perform it, but there is no finding as to the amount of damages, and no request to find upon the subject.

The exception to the finding that the defendant elected to complete the contract himself, is not well taken, because that fact was both alleged in the answer and proved on the trial; and the other findings of fact excepted to were supported by evidence. The conclusion of law that the defendant had waived the forfeiture was amply justified by the proof, and the exception thereto cannot be sustained.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

HORACE B. CLAFLIN et al., Appellants, *v.* LOUIS S. LENHEIM, Respondent.

Where one has been been constituted and accredited as agent to carry on a business for another, his authority to bind his principal continues after actual revocation as to those who have been accustomed to deal with him as such agent, until notice of the revocation is brought home to them.

As to whether the doctrine of constructive notice is applicable to such a case, *quære.*

Dubious or equivocal circumstances will not be substituted for actual notice.

In action to recover for goods sold, it appeared, indisputably, that, prior to July, 1867, H., the brother of defendant, with authority to act for him, had carried on a store at M., in the name of defendant, and was in the habit of purchasing goods for the store from plaintiffs on defendant's credit, the bills therefor being rendered to and paid by him. In July, 1867, the store was partially destroyed by fire, and the agency of H. was terminated. Defendant carried on a store himself at G. B., purchasing goods therefor of plaintiffs, but, having some difficulty in settling with them the accounts of the store at M., after the fire, he suspended all dealings until October, 1869, when he again purchased goods for his store at G. B. In November and December, 1869, H., without authority, purchased goods in defendant's name, to go to M. in the same manner as before. Plaintiffs had notice of the fire, but the evidence was conflicting as to whether they had notice of the termination of the agency. The court submitted to the jury, among other things, the question whether, independent of notice, in fact, the circumstances were such as to put the plaintiffs upon inquiry; and charged, in substance, that if they were, although there was no actual notice of the revocation of the agency, plaintiffs were chargeable with constructive notice thereof, and could not recover. *Held*, error; that the facts bearing upon the question of constructive notice being undisputed, that question was one of law for the court, and, as matters of law, they were insufficient to put plaintiffs upon inquiry, or charge them with constructive notice.

Claflin v. *Lenheim* (5 Hun, 269) reversed.

(Argued April 19, 1876; decided June 6, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of defendant, entered upon a verdict, and

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denying a motion for a new trial. (Reported below, 5 Hun, 269.)

This action was brought to recover for merchandise alleged to have been sold by plaintiffs to defendant.

The facts pertinent to the questions discussed appear sufficiently in the opinion.

A. J. Vanderpoel for the appellants. The authority of defendant's agent continued as to plaintiffs until notice of revocation was brought home to them. (Story on Ag., § 470; 1 Chit. on Con. [11th. ed.], 279; *Hayard* v. *Treadwell*, 1 Str., 506; *Anon* v. *Harrison*, 12 Mod., 346; *Salte* v. *Field*, 5 T. R., 215; *Morgan* v. *Stell*, 5 Bin., 305; *Trueman* v. *Loder*, 11 A. & E., 589; *Lamothe* v. *St. L. M. R. and D. Co.*, 17 Miss., 204; *Beard* v. *Kirk*, 11 N. H., 398; Pars. on Con. [5th ed.], 70, 71; 2 Kent's Com., 644; *Mech. Bk.* v. *Livingston*, 33 Barb., 458; *Clapp* v. *Rogers*, 12 N. Y., 283; *Ketchum* v. *Clark*, 6 J. R., 144, 148; *Deering* v. *Flanders*, 49 N. H., 225, 228; *Barfoot* v. *Goodall*, 3 Camp., 147 *Hart* v. *Alexander*, 2 M. & W., 484.) Lapse of time is not notice in the absence of other circumstances. (*Morgan* v. *Stell*, 5 Bin., 305; ——— v. *Harrison*, 12 Mod., 346; *Charlton* v. *Earl of Durham*, L. R., 4 Ch., 433.) A vendor not having actual knowledge of the revocation of the power of an agent may rest on the omission to give notice, unless bad faith on his part is established. (Kerr on Fraud and Mistake, 238; *Jones* v. *Smith*, 1 Hare, 55; *West* v. *Reed*, 2 Ha., 249, 259; *Ware* v. *Ld. Egmont*, 4 DeG., M. & G., 460; *Wilson* v. *Small*, 6 Wal., 83; *Woodworth* v. *Paige*, 5 Ohio St., 70; *Briggs* v. *Taylor*, 28 Vt., 180; *Seybell* v. *Nat. Cur. Bk.*, 54 N. Y., 288.) What may or may not be sufficient to justify an inference of notice is a question of law. (*Birdsall* v. *Russell*, 29 N. Y., 220, 249; *Williamson* v. *Brown*, 15 id., 354; *Welch* v. *Sage*, 47 id., 143, 147.)

A. G. Rice for the respondents. The circumstances being such as would have put a prudent man, acting in good faith,

on inquiry, plaintiffs are chargeable with such notice as the inquiry would develope. (*Mer. Bk.* v. *State Bk.*, 10 Wal., 604, 670; *Whitehead* v. *Boulnois*, 1 J. & C., Exch., 303; *Williamson* v. *Brown*, 15 N. Y., 354; *Barfoot* v. *Goodall*, 3 Camp., 147; *Zoller* v. *Jovin*, 47 N. H., 324; 49 id., 225; 16 East, 169; 43 How., 201.) The rule in regard to notice is substantially the same in cases of partnership and of agency. (Story on Ag., §§ 470–473; Story on Bail., § 208; Story on Part., §§ 128–130, 160, 161, 335; 3 Kent's Com., 67; 2 Greenl. Ev., § 68, *a*; Dunlap's Paley on Ag., 163, note 3.)

RAPALLO, J. The plaintiffs seek to recover in this action the price of certain merchandise which they allege that they sold and delivered to the defendant, through his brother H. S. Lenheim, as his agent.

To establish the agency, they proved that this brother of the defendant had, for several years prior to July, 1867, conducted the business of a store at Meadville, Pennsylvania, in the name of the defendant, and had been in the habit of purchasing goods for that store from the plaintiffs. These purchases were all made in the name and on the credit of the defendant, and the bills thereof were rendered to and paid by him.

The defendant concedes, in his testimony, that previous to a fire which took place in July, 1867, in the store at Meadville, his brother was authorized by him to make purchases and carry on that store in his, the defendant's name, but contends that *after* the fire he terminated such authority. The purchases for which this action was brought were made by the brother, for the Meadville store, in November and December, 1869, in the name of the defendant. The plaintiffs claim that they had no notice of the revocation of the agency, and sold on the credit of the defendant.

The last bill paid by the defendant for goods sold for the Meadville store, was for upwards of $8,000, and was paid in August, 1867. It was for goods sold before the fire. There

was a difficulty between the plaintiffs and the defendant about this bill. An action was brought upon it and an attachment issued against the property of the defendant, and he was required to pay the costs of these proceedings, which he did in August, 1867. The defendant had for several years previously carried on another store at Great Bend, Pennsylvania, and had been in the habit of purchasing goods from the plaintiffs for that store; but after this difficulty he suspended all his dealings with the plaintiffs until the month of October, 1869, when he resumed his business relations with them by the purchase of goods, personally, for the store at Great Bend. In the following months of November and December, 1869, the brother made the purchases now in controversy, in the name of the defendant, for the Meadville store.

The defendant gave evidence on the trial tending to show actual notice to the plaintiffs of the revocation of the agency, after the fire of July, 1867. It was conceded that the plaintiffs had notice of the burning of the store at Meadville, but the evidence of notice of the revocation of the agency was controverted.

The court submitted to the jury the question whether the plaintiffs had notice of the revocation, but charged that if the jury came to the conclusion "that the circumstances of the case were such, independently of the question of notice, that in fair dealing between man and man plaintiffs should have inquired by telegraph or by letter of the defendant at Great Bend whether he continued the Meadville store, and whether the brother continued to have authority to buy goods in his name, that will end the recovery in this case;" and, further, that if the jury came to the conclusion "that no notice in fact was given and that the circumstances were such as to put the plaintiffs fairly upon inquiry as to whether that business was continued by the defendant and the brother had authority to continue it by making these purchases, that ends the responsibility on the part of the defendant." Exceptions were duly taken to the portions of the charge above quoted.

Opinion of the Court, per RAPALLO, J.

It is a familiar principle of law that when one has constituted and accredited another his agent to carry on a business, the authority of the agent to bind his principal continues, even after an actual revocation, until notice of the revocation is given; and, as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. The case of such an agency is analogous to that of a partnership, and the notice of revocation of the agency is governed by the same rules as notice of the dissolution of a partnership. As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor, or at least, that the credit should have been given under circumstances from which notice can be inferred. Where the circumstances are controverted, or where notice is sought to be inferred as a fact, from circumstances, the question is for the jury; they must determine, as a question of fact, whether the party claiming against the partnership or the principal, did have notice of the dissolution or revocation; and there being some evidence of the fact of notice, the court, in the present case, properly submitted to the jury this question of fact.

But the court submitted to the jury the further question whether, independently of the question of notice in fact, the circumstances were such as to put the plaintiffs on inquiry as to whether the authority of the agent continued, and charged them that if they were, the plaintiffs were charged with notice of the facts which the inquiry would have disclosed. In other words, the question was submitted to the jury whether, although the plaintiffs had no notice in fact, they had constructive notice of the revocation of the agency.

Assuming that the doctrine of constructive notice is applicable to cases of this description, what circumstances amount to constructive notice is a question of law. Where the facts are in dispute, a mixed question of law and fact is presented, and then of course the question is to be determined by the jury, under instructions by the court, as to the effect of the circumstances which they may find to have existed. But the

question whether circumstances which are undisputed, or are found by the jury, are sufficient to put a party on inquiry and thus charge him with constructive notice, is not for the jury but for the court.

In this case, throwing out of view the evidence bearing upon the question of actual notice, there was no controversy about the facts. These were, that the store at Meadville was burnt in July, 1867, and the plaintiffs knew of the fire; that the plaintiffs brought an action and issued an attachment against the defendant for the bill then due for goods furnished to the store at Meadville; that this claim and the costs of the proceedings were paid by the defendant in August, 1867, and the defendant thereafter suspended all dealings with the plaintiffs until October, 1869, when he resumed them, and that in November, 1869, the brother resumed his purchases for the Meadville store, from the plaintiffs, on credit, in the name of the defendant, and the plaintiffs gave him credit as the agent for the defendant. Whether these circumstances were sufficient to put the plaintiffs on inquiry, or in other words, whether they amounted to constructive notice of the fact which an inquiry would have disclosed, viz., the revocation of the agency, was a question of law, to be determined by the court, and it was error to submit it to the jury. (*Am. Linen Thread Co.* v. *Wortendyke*, 24 N. Y., 550; *Howe* v. *Thayer*, 17 Pick., 91.)

Constructive notice is a legal inference from established facts, and when the facts are not controverted the question is one for the court. Whether, under a conceded state of facts, the law will impute notice, is not a question for the jury. (*Birdsall* v. *Russell*, 29 N. Y., 220, 249.)

This error, however, would not be ground for reversing the judgment if it appeared that the court would have been justified in holding, as matter of law, that the circumstances were sufficient to put the plaintiffs on inquiry, and we must, therefore, examine that question.

The mere fact that the store at Meadville was burnt did not indicate that the defendant intended to discontinue business

there; and if business had been promptly resumed and purchases for that store renewed by the defendant's brother, there could have been no reason, in the absence of any notice from the defendant, to suppose that the agency had been discontinued. The principal feature in the case is the delay of two years and upwards between the fire and the resumption of purchases, by the defendant's brother, for the Meadville store. But, under the circumstances, this delay might well have been attributed by the plaintiffs to the difficulty between them and the defendant, in July and August, 1867, which resulted in the defendant suspending all dealings with the plaintiffs, notwithstanding that he continued his business at Great Bend. And when the defendant, in 1869, resumed his dealings with the plaintiffs, without giving them notice of any change in his business arrangements with his brother, at Meadville, the plaintiffs were warranted in believing that the suspension of the dealings of the brother was attributable to the same cause which had deterred the defendant himself from making purchases; and when, immediately after the defendant himself resumed dealings, the brother applied to make purchases as before, for the Meadville store, the plaintiffs would not, naturally, attribute the suspension of dealings for that store, in the meantime, to a revocation of the agency, nor suspect that the brother was committing a fraud. We must, in considering the portion of the charge excepted to, assume, as we have assumed, that no notice was given by the defendant to the plaintiffs that he had discontinued his business at Meadville or revoked the authority of his brother, and that the plaintiffs knew nothing of it, for the charge expressly submits the question of constructive notice, independently of the question of notice in fact, and expressly states that the jury are to pass upon it in case they find that there was no notice in fact.

We think that the circumstances existing at the time of the sale of the goods in question were not sufficient to constitute constructive notice of the revocation of the agency, and that the case should have been submitted to the jury only upon the question of notice in fact. In this there is no hardship

upon the defendant; it was his duty, after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiffs had been to his knowledge. This was an act easily performed and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or dubious or equivocal circumstances substituted in place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most usual and necessary precaution.

The jury may have been satisfied that notice was given, but under the charge they may have rendered their verdict solely on the ground of constructive notice; the judgment must, therefore, be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

HENRY A. RICHARD, Appellant, *v.* ISAAC B. WELLINGTON et al., Respondents.

Plaintiff, in August, 1866, stored in defendants' warehouse a lot of wines, and another lot in November, 1868, with the understanding that defendants were to purchase them. In February, 1870, defendants having declined to give a definite answer as to whether they would purchase, plaintiff, with a view of bringing them to a determination, rendered bills dated respectively at the dates when the wines were placed in defendants' custody. The bills were not assented to by defendants, and no agreement was made as to price and terms of sale. In July, 1870, plaintiff sent to defendants a statement of the wines, crediting thereon, "by amounts received on account, $32,272.63." Defendants failed in November, 1870, having, prior to that time, disposed of the wines. In an action for conversion, after defendants, for the purpose of showing a sale, had given in evidence the statement of July, 1870, plaintiff offered to prove facts tending to show that the credit was not for

Statement of case.

payments made specifically, on account of the alleged purchase, but for moneys due defendants from plaintiff in other transactions, which the latter were willing to offset. This evidence was excluded and plaintiff nonsuited. *Held* (CHURCH, Ch. J., dissenting), error; that the evidence was proper and material, as destroying the effect of the credit as an admission of a consummated sale; and that this being explained, the evidence was sufficient to entitle plaintiff to go to the jury on that question.

(Argued April 21, 1876; decided June 6, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department in favor of defendants, entered upon an order nonsuiting plaintiff on trial at Circuit.

This action was for the alleged conversion of a quantity of sherry wines.

The evidence tended to show that plaintiff, being an importer of sherry wines, in August, 1866, received an importation of 800 casks, which, upon the representation of defendants that they would probably purchase, he stored in defendants' warehouse. In November, 1868, he recived 100 casks more, which he also stored with defendants under the same understanding. In February, 1870, defendants not having determined as to purchasing, plaintiff sent to them two bills, one of each lot, dated respectively at the dates when the wines were stored. A short time prior to sending the bills, plaintiff told defendants that they must take the wines or return them, and was thereupon requested to send the bills. Defendants informed plaintiff that they would not agree to the bills, but wanted certain deductions made; these plaintiff declined to make. Plaintiff several times demanded of defendants that they determine whether they would take the wines or not, but was requested on each occasion to wait. Defendants gave in evidence a letter of plaintiff, written July 28, 1870, to which was appended a note or statement as follows:

To amount due me, 18 March, '70	$44,826 34
By cash, sundry dates from 13th Feb'y, to date,	303 90
By amounts received on account.....	32,272 63

Statement of case.

Plaintiff, as a witness in his own behalf, was asked to explain what the credit alluded to. He answered that it alluded to note transactions between himself and defendants. He was then asked to state what these note transactions were, and how he came to make the credit, and also the facts which induced the credit. This was objected to, and objection sustained, to which plaintiff's counsel duly excepted. The court granted a motion for a nonsuit, to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

W. C. Lyon for the appellant. Plaintiff had sufficient interest in the wines to entitle him to maintain this action. (*Grinnell* v. *Schmidt*, 2 Sandf., 706; *Everett* v. *Salters*, 15 Wend., 474; *Salters* v. *Salters*, 20 id., 267; *Grosvenor* v. *Phillips*, 2 Hill, 147; *Adams* v. *Bissell*, 28 Barb., 382; *Judah* v. *Kemp*, 2 J. Cas., 411; 42 Barb., 177; 33 N. Y., 587; *Faulkner* v. *Brown*, 13 Wend., 63; *Rockwell* v. *Sanders*, 19 Barb., 473.) There was no sale of the wines, as the minds of the parties never met as to the quantity, terms or price. (*Camp* v. *Norton*, 52 Barb., 96; *Bernendaller* v. *Hoen*, 7 Blatch., 548; *Walrath* v. *Ingles*, 64 Barb., 265; *Scranton* v. *Bath*, 29 id., 171; *Baldwin* v. *Milderberger*, 2 Hall, 176; *Joyce* v. *Adams*, 4 Seld., 291; *Fullerton* v. *Dalton*, 58 Barb., 236.) The court erred in refusing to allow plaintiff to proceed with the case and recover, as in an action on contract, for the sale and delivery of the wines. (*Eldridge* v. *Adams*, 54 Barb., 417; *Gordon* v. *Hostetter*, 37 N. Y., 99; *Prouty* v. *Swift*, 51 id., 594; *Coit* v. *Stewart*, Alb. L. J., March, 8, 1873; *Conaughty* v. *Nichols*, 42 N. Y., 83.)

William Allen Butler for the respondents. The evidence on behalf of plaintiff made out a plain case of sale and delivery. (*Martin* v. *Adams*, 104 Mass., 262; *Nichols* v. *Patten*, 18 Me., 231; *Lake* v. *Morris*, 30 Conn., 201; *Warden* v. *Marshall*, 99 Mass., 305, 306.) Defendants were not guilty of a conversion in selling the wines. (*Campbell* v. *Stokes*, 2

Wend., 137; 1 Waterman on Trespass, 585, § 569.) Plaintiff is estopped by his acts from asserting that there was no sale. (*Stephens* v. *Baird*, 9 Cow., 274, 278; *Mofford* v *Bliss*, 12 B. Mon., 256, 257; *Covert* v. *Irwin*, 3 S. & R., 283–289; *Packard* v. *Sears*, 6 Ad. & El., 469; *Grigg* v. *Wells*, 10 id., 90; 4 B. Mon., 329; 19 Ala. [N. S.], 430; 10 Ire., 320; 12 Penn., 373; 6 Wend., 436; 4 Comst., 309; 3 Hill, 215; 12 B. Mon., 256, 257; 19 Penn. [7 Har.], 424; 6 Har., 346; 11 S. & R., 426.)

RAPALLO, J. The testimony of the plaintiff tended to show that the contemplated purchase of the wines by the defendants was never consummated. On his evidence it is difficult to determine that an action could have been maintained by the plaintiff for the price of the goods as on a contract of sale. But the General Term appear to have held that the rendition of bills for the wines, at the dates when they went into the possession of the defendants, and the subsequent receipt by the plaintiff of $32,272.63 on account of the price, and the claim for the balance as for goods sold, were such controlling circumstances that a verdict for the plaintiff would have been set aside, and, consequently, the nonsuit was properly granted.

If the facts were as assumed, the conclusion would probably follow. On an examination of the evidence, however, we find that it shows that the bills, although dated in 1866 and 1868, when the wines were placed in the custody of the defendants, were not rendered to them until February 26, 1870; and then, for the purpose of bringing them to a definite determination whether or not they would conclude the purchase, they having up to that time declined to give a definite answer. That the bills were not agreed to by the defendants, and that they failed in November, 1870, and before having agreed upon the price and terms of sales, and that they had, in the meantime, disposed of the wines. The alleged payment on account, if established, would have been a very strong, if not conclusive circumstance, to establish that there was a sale, and is relied

upon by the court below as a contradiction of the plaintiff's testimony. But the only evidence of this payment is the statement at the foot of the plaintiff's letter of July 28, 1870: "By amounts received on account, $32,272.63." The plaintiff offered to explain this credit, and testified that it alluded to note transactions between him and the defendants; but evidence as to what those transactions were, and of the facts upon which the credit was based, was excluded by the court and exception duly taken to the ruling. The tendency of the evidence thus excluded, as indicated by other evidence in the case, was to show that this credit was not in fact for payments made specifically on account of the alleged purchase, but for money due by the plaintiff to the defendants on other independent transactions which the plaintiff was willing to offset against the price of the wines. This evidence was material and was, we think, improperly excluded. It would have destroyed the effect of the credit acknowledged in the letter as an admission of a consummated sale and the receipt of payments on account.

There was some evidence in the case tending to show that the plaintiff had notice that the defendants were selling the wines, but, on the whole case, we think that if the credits were satisfactorily explained, there was sufficient to entitle the plaintiff to go to the jury, and that, in excluding the explanatory evidence and nonsuiting the plaintiff, there was error.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur, except CHURCH, Ch. J., dissenting.

Judgment reversed.

Statement of case.

66 313
124 64
125 425

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166 200

ELIZABETH J. BLAIR, Administratrix, etc., Respondent, *v.* THE ERIE RAILWAY COMPANY, Appellant.

Where there is no express exemption provided by contract, a railroad company is liable for the consequences of its own or its servants negligence to persons traveling upon its trains, as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare.

One temporarily supplying the place of an express messenger stands in the same position with him, and is entitled to the same protection.

Eaton v. *Delaware, Lackawanna and Western Railroad Company* (57 N. Y., 382) distinguished.

The terms of a contract which will exempt a railroad corporation from liability for negligence must be clear and unmistakable.

Defendant entered into a contract with the United States Express Company, in 1858, for the transportation of freight, by which it agreed, among other things, to transport, free of charge, the money-safes, contents and messengers of the express company, it "assuming no liability whatsoever in the matter." In 1871 another contract was made, by its terms, adopting the conditions of the former contract, save as modified. It provided that defendant should assume the usual risks taken by railroads as to freight, except that it "shall not assume any risk or loss on any money, bank-notes, bonds, gold, bullion or jewelry packages, and for which, with the express company's safes and messengers, no charge for carriage is to be made."

In an action for the alleged negligent killing of an express messenger, *held* (EARL, J., dissenting), that the clause referred to in the contract of 1858 was abrogated by that of 1871; also that reading them both together there was no exemption of defendant from liability.

Smith v. *New York Central Railroad Company* (24 N. Y., 222); *Bissell* v. *New York Central Railroad Company* (25 id., 442); *Stinson* v. *New York Central Railroad Company* (32 id., 333), and *Poucher* v. *New York Central Railroad Company* (49 id., 263) distinguished.

(Argued April 28, 1876; decided June 6, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiff, entered upon an order denying a motion for a new trial, and directing judgment on a verdict.

This action was brought to recover damages for the alleged negligent killing of Nathaniel P. Blair, plaintiff's intestate

Statement of case.

The accident causing the death of Blair occurred April 2, 1874. Blair was employed by the United States Express Company to deliver freight about town at Hornellsville. He had formerly been an express messenger on the cars. On the day mentioned, at the request of the regular express messenger, he took his place upon a train and took charge of the express matter thereon. The train collided with another through the negligence of defendant's employes, and Blair was killed.

Defendant gave in evidence two contracts between it and the express company, one dated August 2, 1858, which contained this clause:

"The party of the first part [defendant] further agree to transport, free of charge, to and from Jersey City, Dunkirk and Buffalo, and to such other points on the line of their road as the second party may deem expedient in order to accommodate their business, their money-safes, contents and messengers, the party of the first part assuming no liability whatever in the matter."

The other contract, dated March 15, 1872, contained these clauses:

"First. For and in consideration of the terms and conditions hereinafter named, it is mutually agreed that the contract entered into between the New York and Erie Railroad Company and the United States Express Company on the 2d day of August, 1858, and which has governed the business relations of the said parties up to the present time, shall be continued and executed as heretofore, subject to the modifications and additions herein made."

"Third. It is further agreed that the Erie railway shall assume the annual risks taken by railroads on the express matter of the parties of the second part, excepting that the railway company shall not assume any risk or loss on any money, bank-notes, bonds, gold, bullion or jewelry packages, and for which, with the express company's safes and messengers, no charge for carriage is to be made by said railway company."

Statement of case.

The court held that the contracts afforded no defence to the action, and submitted to the jury only the question of damages, to which ruling defendant's counsel duly excepted. Exceptions were ordered to be tried at first instance at General Term.

E. C. Sprague for the appellant. Defendant was not liable in this action. (*McFadden* v. *N. Y. C. R. R. Co.*, 44 N. Y., 478; *Wells* v. *N. Y. C. R. R. Co.*, 24 id., 181, 183; *Perkins* v. *N. Y. C. R. R. Co.*, id., 196; *Bissell* v. *N. Y. C. R. R. Co.*, 25 id., 443; *Poucher* v. *N. Y. C. R. R. Co.*, 49 id., 263; *Alexander* v. *Greene*, 7 Hill, 533; *Wells* v. *S. Nav. Co.*, 2 Comst., 204; *Lesson* v. *Holt*, Stark., 185; *Austin* v. *W., etc., R. Co.*, 70 E. C. L. R., 454; *Vantole* v. *S. E. R. Co.*, 104 id., 75; *Peck* v. *N. E. R. Co.*, 96 id., 957; *Stinson* v. *N. Y. C. R. R. Co.*, 32 N. Y., 333; *McAuley* v. *Furness*, L. R., 8 Q. B., 59; *Adams Ex. Co.* v. *Haynes*, 42 Ill., 89; *B. and O. R. R. Co.* v. *Brady*, 32 Ind., 333.) The intestate was not a passenger within the ordinary signification of that term. (*Eaton* v. *D., L. and W. R. R. Co.*, 57 N. Y., 382, 384; Ang. on Cor., §§ 521, 524, 525; *Kimball* v. *R. and B. R. Co.*, 26 Vt., 247; *Shaw* v. *Y. and N. M. R. R. Co*, 6 Eng. R. Cas., 87; 1 Am. R. Cas., 181; *Austin* v. *W., etc., R. Co.*, 5. E. L. and Eq., 329; *N. J. S. Nav. Co.* v. *Mer. Bk.*, 6 How. [U. S.], 344.)

Geo. B. Bradley for the respondent. Defendant's liability was established unless it has a defence under the contract set forth in the answer. (S. & R. on Neg., § 4; *Sutton* v. *W. R. Co.*, 15 N. Y., 444; *Coggs* v. *Barnard*, 1 S. L. Cas., 82; *P. and R. R. Co.* v. *Derby*, 14 How. [U. S.], 468; 1 Am. R. Cas., 129; *Collett* v. *L. and N. W. Co.*, 6 E. L. and Eq., 305; *Smith* v. *N. Y. C. R. R. Co.*, 24 N. Y., 222; *R. R. Co.* v. *Lockwood*, 17 Wal., 357.) The words used in the contract limiting defendant's liability, are merely general, and even if the deceased had been a party to it, they would not amount to a release of liability arising from defendant's negligence.

(*R. R. Co.* v. *Lockwood*, 17 Wal. 357; *Smith* v. *N. Y. C. R. R.*, 24 N. Y., 222; *Bissell* v. *N. Y. C. R. R. Co.*, 25 id., 442; *Poucher* v. *N. Y. C. R. R. Co.*, 49 id., 263; *Ominger* v. *N. Y. C. R. R. Co.*, 6 T. & C., 498, 501.)

MILLER, J. The defendant seeks exemption from liability for the injuries sustained by the plaintiff's intestate upon the ground that the intestate was bound by the terms of the contract entered into between the defendant and the express company, and that such contract exonerates the defendant from liability for negligence.

The original contract between the defendant and the express company, provided that the defendant should transport, free of charge, the money-safes, contents and messengers of the express company, "the party of the first part assuming no liability whatever in the matter." By the subsequent modification of the contract, provision was made that the railway company should assume the usual risks upon express matter, except that they should not assume any risk or loss upon any money, etc., for which, with the express company's safes and messengers no charge for carriage was to be made, and the latter were to pass free of charge. The condition referred to was general in its character, and evidently related to the liability and duty of the defendant in its ordinary dealings with the express company. It does not purport to control or adjust any other rights or duties. It contained no provision, and there was no agreement that the company should not be liable for negligence, and the scope of the contract is not to be extended beyond what was evidently intended and was in the contemplation of the parties. Conceding the doctrine that the defendant had a right to protect itself by contract, from any liability for negligence on the part of its employes, such protection cannot be invoked unless the contract contains a provision to that effect. None of the cases which hold that the defendant is exonerated under a special contract, go to the extent claimed or affect a contract of the character of the one now presented. In *Smith* v. *The*

New York Central Railroad Company (24 N.Y., 222), the contract was, that "persons riding free to take charge of the stock, do so at their own risk of personal injury from whatever cause." The ticket also provided that such person takes "all the responsibility as to the injury of himself and stock." In *Bissell* v. *The Same* (25 N. Y., 442), the contract was the same as in the last case cited, and on the ticket was an agreement that the company should not be liable under any circumstances, "whether of negligence of their agents or otherwise," for any injury to the person or stock. In the prevailing opinions in this case, the decision is placed upon the terms of the contract and some stress is laid on the same; but as such contract expressly provided that the person riding did so at his own risk of personal injury, I do not see that it bears any analogy to a contract which contains no such clause and does not stipulate against personal risks. In *Poucher* v. *The New York Central Railroad Company* (49 N. Y., 263), the contract provided against negligence of the defendant or its agents or otherwise. (See, also, *Stinson* v. *New York Central*, 32 N. Y., 333.) It will thus be seen, that in each the cases cited there was an express provision which evidently guarded against every kind "of personal injury from whatsoever cause," which might, perhaps, include such as might arise from negligence. While here no language is employed which can be fairly interpreted as aimed against negligence, it would, I think, be extending the purpose and scope of the contract in this case far beyond its legitimate object, to hold that it was designed to protect the defendant against its own negligent acts. The English cases which are cited and which have been examined do not establish the proposition contended for, and no case has been referred to — where it is held, that any language, except such as was entirely clear and unmistakable in its terms, will exempt a railroad company from liability for negligence. It may also be observed that there is quite a distinction between cases where damages for injuries are expressly provided against, or where the traveler agrees to be

carried at his own risk and those where the contract states generally, that the carrier assumes no liability. If the views enunciated are correct, then the defendant would not be exonerated from liability for negligence where the messenger was injured, and it would seem to follow that one who was temporarily injured in his place would stand in the same position.

There is no provision in the contract which prevents the employment by the express company, of any person as a messenger, or in the place of such messenger, when, for any reason, he is prevented from attending to his duties. The intestate therefore was lawfully upon the cars and entitled to the same protection as the messenger whose place he filled. The circumstances presented bear no analogy to that of a person who is invited by a conductor without authority, and contrary to the regulations of the company, to ride upon a train which is not intended to carry passengers without paying his fare, as was the case in *Eaton* v. *Delaware, Lackawanna & Western Railroad Company* (57 N. Y., 382). For the reasons already stated, without considering the other questions raised, the judgment was right and must be affirmed.

ALLEN, J. Upon a reasonable interpretation of the contracts between the defendant and express company, there is no stipulation that the persons riding free, as messengers of the latter company, shall take and bear all risks of personal injury, without recourse to the carrier for compensation for damages sustained through its negligence, or the negligence of its servants. There is no provision in terms restricting the liability of the railway company to the messengers of the express company, or distinguishing the latter from other passengers carried upon the road, or who may be lawfully on the trains as passengers. Without an express exemption, provided by contract, the defendant is liable for the consequences of its negligence, or that of its servants, to all persons traveling and carried upon its trains, as messengers or agents of the express company, to the same extent as to other pas-

sengers. (*Nolton* v. *W. R. Corporation*, 15 N. Y., 444.) The clause in the contract of 1858, relating to this subject, was abrogated by the third paragraph in the contract of 1871, which covers the whole subject, and makes provision for the carriage of the passengers of the express company, without charge, and limits the exemption from liability to risks or loss on money, bank notes, bonds, gold, bullion or jewelry packages. These packages, with the safes and messengers of the express company, are to be carried free of charge, but the latter are not included within the clause exempting the carrier from liability, but are only included within the exemption from charges for carriage. The contract of 1858, in this respect, is ambiguous, and does not clearly and certainly exempt the railway company from liability for personal injury to the passengers carried under it, resulting from negligence. An exemption can only exist when expressly created by contract, and can only be claimed here upon a strained construction of the contract. But this ambiguity is cleared up by the contract of 1871, and whether the latter contract is the only one to be considered, or both are to be read together, there is no exemption of the railway company from liability to the messengers and agents of the express company. The latter are carried as passengers, the carrier company receiving its compensation from the incidental benefits of the contract, and it must respond to them as to others for injuries caused by negligence.

This leads to an affirmance of the judgment, without considering the other questions raised.

EARL, J. (dissenting). I will briefly state the grounds of my dissent from the conclusion reached by my brethren. In the first contract the defendant agreed to transport, free of charge, the "money-safes, contents and messengers" of the express company, "assuming no liability whatever in the matter." In the second contract it is provided that the former contract shall continue and be binding on the parties except as modified by that contract, and the third clause of

that contract is as follows: "It is further agreed that the Erie railway shall assume the usual risks taken by railroads on the express matter of the parties of the second part, excepting that the railway company shall not assume any risk or loss on any money, bank-notes, bonds, gold, bullion, or jewelry packages, and for which, with the express company's safes and messengers, no charge for carriage is to be made by said railway company." This clause contains a more minute specification of the things which were to be carried free of charge and free of risks. It cannot be supposed that it was intended to so alter the first contract that while the railroad company should be bound to continue to carry the safes and messengers free of charge, it was to assume risks in reference to them. Both contracts showed that it was the intention of the parties that the railroad company was to assume no liability in reference to any thing which it was to carry free.

It becomes important, then, to inquire into the meaning of the language used in the first contract exempting the defendant from liability in reference to express messengers. The language is as comprehensive as it well could be: "assuming no liability whatever." What did the parties mean? Railroad companies do not insure the safety of persons lawfully riding upon their cars. (*McPadden* v. *The N. Y. C. R. R. Co.*, 44 N. Y., 479.) They are liable to such persons only in case they are injured by some kind of negligence. Hence, unless the language used was intended to exempt the defendant from liability for injuries occasioned by negligence, it has no meaning or force whatever. The parties must be held to have used the language for some purpose, and that purpose clearly was to exempt the defendant from liabilities which would otherwise rest upon it.

But it is claimed that the messenger was not bound by this agreement, in the absence of proof that he knew of it and thus can be held to have assented to it. He was not a passenger upon the train. He was upon the train in an express car engaged in the separate business of the express company. He was in that car lawfully only as he was there

under the agreement. He knew that he had not paid any fare, and that he had made no contract for his carriage. He must have known that he was there under some arrangement between the express company and the defendant, and that whatever right he had to be transported was as the servant of the express company. He was there not in his own right, but in the right of the express company, and hence he was bound by the arrangement that company made for him.

I am, therefore, of opinion that the judgment ought to be reversed.

All concur for affirmance, except EARL, J., dissenting.

Judgment affirmed.

OLIVENA FERRY, Respondent, *v.* DELEVAN STEPHENS et al., Appellants.

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In an action to enforce specific performance of an agreement to convey lands, the court found, in substance, that one S., intending to give to plaintiff certain lands, executed a contract for the sale and conveyance thereof to her on payment of $1,100, which she agreed to pay. It was never intended that she should pay any thing, and S. subsequently indorsed upon the contract a receipt in full of the purchase-price; no money was in fact paid. *Held*, that whatever may have been the intent, the agreement to convey was not voluntary, as it was for a valuable consideration; that the contract did not operate as a gift of the land, and conclusively rebutted an intent to make a present gift; that the findings were in effect that the vendor, to accomplish his purpose of giving the lands, gave the debt which represented his interest therein; that the receipt operated as a valid and complete gift of the debt, leaving the right of the plaintiff to a conveyance in force, as if the debt had been paid.

(Argued May 24, 1876; decided June 6, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, reversing a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 5 Hun, 109.)

This action was brought to enforce the specific performance of a contract between one Vincent Stephens and plaintiff for

the sale and conveyance by the former to the latter of certain premises in the village of Hornellsville, Steuben county. By the contract, which was in writing, dated March 10, 1862, Stephens agreed to sell the premises for the sum of $1,100, payable in annual installments, which plaintiff agreed to pay, and, upon payment being completed, Stephens agreed to convey. Plaintiff was the sister of Stephens. The court found the following facts, among others:

"That at the time of making said contract, it was the object and intention of Vincent Stephens to make a gift of the said premises to the plaintiff, and the same was so understood by the plaintiff. That it was not intended by either of the parties to said contract that any consideration should be paid for said premises, and that the consideration was inserted in said contract to conceal the fact that it was a gift from other brothers and sisters of the said Vincent Stephens, who were interested in the disposition of his estate.

"That on the 18th day of April, 1862, the said Vincent Stephens indorsed upon the said contract a receipt in full of the purchase-price of said premises, but no payment was ever in fact made to him thereon, nor was it ever intended that any payment should be made; and, in fact, the said plaintiff has never paid any part of the consideration of said contract.

"That in the month of June, 1862, Vincent Stephens died, having made a will of real and personal estate, which was duly proved before the surrogate of the proper county, in and by which he devised the said premises to the defendant, Delevan Stephens."

The court found, as conclusion of law, "that the said contract being a mere voluntary executory promise to give lands to the plaintiff, the specific performance cannot be enforced in equity," and thereupon directed judgment, dismissing the complaint.

William Rumsey for the appellants. No presumption of payment by plaintiff can create the equitable title necessary to sustain a decree for specific performance. (*Morey* v. *F. L*

and T. Co., 14 N. Y., 302, 307, 308; *Lawrence* v. *Ball*, id., 477, 480; *N. Y. L. Ins. and T. Co.* v. *Covert*, 6 Abb. Pr. [N. S.], 154; *Jones* v. *Mer. Bk.*, 4 Robt., 221; 6 id., 162.) To constitute a gift, there must be delivery of the subject of the gift with the intention to give it. (*Taylor* v. *Fire Dept.*, 1 Edw. Ch., 294; *Doty* v. *Wilson*, 47 N. Y., 580, 583.) The intent is solely a question of fact. (*Thurston* v. *Cornell*, 38 N. Y., 281, 287; *Kerrains* v. *People*, 60 id., 221, 228, 229; *Fisk* v. *Chester*, 8 Gray, 506, 508.) No consideration having passed from plaintiff, the mere promise to convey to her the lands was not sufficient to pass the title. (*Moore* v. *Moore*, L. R., 18 Eq., 474, 482; *Antrobus* v. *Smith*, 12 Ves., Jr., 39, 46; *Edwards* v. *Jones*, 1 M. & Cr., 226, 237; *Coleman* v. *Sorrel*, 1 Ves., Jr., 50; *Ellison* v. *Ellison*, 6 id., 659; 1 L. Cas. in Eq. [3d Am. ed.], 199, 218 [m. p.]; *Bunn* v. *Winthrop*, 1 J. Ch., 329; *Minturn* v. *Seymour*, 4 id., 497; *Heartley* v. *Nicholson*, L. R., 19 Eq., 233, 243; *Milroy* v. *Lord*, 4 D., F. & J., 264; *Warrener* v. *Rogers*, L. R., 16 Eq., 340; *Richards* v. *Delbridge*, L. R., 18 id., 11, 15.) Plaintiff must pay the money called for by the contract before she is entitled to a conveyance. (2 Pars. on Con., 530, note; 1 Wm. Saund., 481; *Cadwell* v. *Blake*, 6 Gray, 402, 409; *Smith* v. *Brady*, 17 N. Y., 173, 189, 190.)

Harlo Hakes for the respondent. There was a valid gift to plaintiff of the money due on the contract. (2 Kent's Com., 439; *Champney* v. *Blanchard*, 39 N. Y., 111–115; *Westerlo* v. *Dewitt*, 36 id., 1340; 10 J. R., 294; *Gray* v. *Barton*, 55 N. Y., 68.)

ANDREWS, J. The judgment of the Special Term cannot be sustained on the ground upon which it was placed, that the action is brought to enforce the specific performance of a voluntary agreement for the conveyance of land. There was no want of consideration for the promise of Vincent Stephens to convey the land. The promise of the plaintiff to pay the purchase-price was a valid consideration for the promise of

the other party. The agreement was in writing, signed by both parties, and was mutually obligatory. It is quite immaterial, in the absence of fraud or mistake, neither of which is claimed, what object or intention the parties may have had at variance with the terms of the agreement, or that both understood that the vendor would not exact the payment of the purchase-money, or that he intended to give the land to his sister. The contract did not operate as a gift of the land, and the intention to give the land could only be consummated by an actual conveyance, and the intention to make a present gift is conclusively rebutted by the covenant which the vendor took for the payment of the consideration. The parol understanding between the parties would be no answer to a suit brought by the vendor to enforce the performance of the plaintiff's promise to pay the purchase-money. The suit was not, therefore, as the learned judge of the Special Term seemed to suppose, brought to enforce a voluntary executory promise to give the land to the plaintiff. The payment of the purchase-money by the plaintiff was made by the agreement a condition precedent to the obligation of the vendor to convey the land, and the plaintiff, in order to entitle herself to a specific performance of the contract, was bound to show that payment, in fact, had been made, or that her promise to pay the purchase-money had, in some way, been satisfied. It is conceded that there was no actual payment of any part of the consideration. The plaintiff, to maintain her right of action, relies upon the fact that her brother, about a month after the contract was made, indorsed upon it a receipt in full of the purchase-price. The judge also found that the plaintiff's brother, when the contract was made intended to give her the land, and that the consideration was inserted to conceal this intention from other relatives, and in connection with the finding that the receipt was subsequently indorsed on the contract, he finds that it was never intended that any payment should be made thereon. These findings, taken together, are equivalent to finding that the vendor, to accomplish his purpose to give the

land to his sister, gave her the debt which represented his interest in the land. He became, on the execution of the contract of sale, a trustee for the plaintiff of the land, having a lien for the purchase-money, and she became his debtor for the consideration.

That the receipt was intended as a gift of the debt is clearly inferable from the facts found. His primary intention was to give her the land. The gift of the debt would not give her the legal title, but it gave her the whole beneficial interest, provided it operated as a legal satisfaction of her promise. The position of the General Term, that when the lien of the vendor, under a contract for the sale of land, for the purchase-money, is extinguished by payment or by what, as respects the vendor, was equivalent to payment, he becomes a naked trustee, and is bound to convey to the vendee the legal title, admits of no controversy. There was no intention in giving the receipt that the vendor should be discharged from his promise. It states that the money expressed therein, was received to apply on the contract. Whether the giving of a receipt for the debt was effectual to confer the benefit intended, is a question of law, but it is clear, from the facts found, that the receipt was intended to operate as a forgiving and satisfaction of the plaintiff's obligation under the contract, so as to leave the right of the plaintiff to a conveyance in force as if the debt had been paid. The case, therefore, comes to this single question, viz., was there a valid gift of the debt to the plaintiff by her brother. The case of *Gray* v. *Barton* (55 N. Y., 68), is a decisive authority for the plaintiff on this question. The plaintiff does not, in this case, seek the aid of the court to perfect an incomplete gift. The gift of the debt was complete upon the execution of the receipt. The vendor's purpose of giving the land has never been executed, only so far as it results from his giving the plaintiff the debt for the purchase-money. The plaintiff's obligation under the contract having been satisfied, the only unperformed stipulation remaining, is that of the vendor to convey the land, and this action is brought to enforce that stipulation.

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The language of GROVER, J., in *Gray* v. *Barton*, answers the objection founded on want of consideration. He says, "the proof of want of consideration for the receipt was annulled and avoided by the proof that it was given to consummate a gift of the debt."

The judgment of the General Term should be affirmed, and judgment absolute for the plaintiff ordered on the stipulation.

All concur.

Order affirmed and judgment accordingly.

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THE WESTERN NEW YORK LIFE INSURANCE COMPANY, Appellant, *v.* DE WITT W. CLINTON et al., Respondents.

In an action against sureties upon a bond given by an agent for the faithful performance of his duties, the surrounding circumstances and the situation of the parties, at the time of its execution, may be considered in construing its terms, in case of ambiguity therein.

It is no defence to an action upon such bond that the sureties were ignorant as to the extent of the obligation assumed, or were misled by the principal in reference thereto, in the absence of proof that the obligee was a party to the fraud; it is not the duty of the obligee to seek out the sureties and explain to them the nature and extent of their obligation, but it is for the sureties to ascertain for themselves.

Defendant De W. W. C., as principal, and the other defendants, as sureties, executed a bond to plaintiff reciting the appointment of De W. W. C. as agent for plaintiff "for the purpose of procuring applications for life insurance and collecting premiums thereon." Plaintiff and De W. W. C. had entered into two contracts, the first appointing the latter as general agent to procure applications for, and to effect all kinds of, insurance authorized by plaintiff, he to retain a certain per centage and to account for, and pay over, the residue; by the second, De W. W. C. agreed to collect renewal premiums on policies issued through a former general agent, he to receive a per centage, but to apply the same toward the purchase of the renewals until he had paid $1,000, when the said renewals were to be assigned to him and he to be entitled thereafter to retain the per centage. The former contract was shown to the sureties when they executed the bond; it did not appear that they saw or knew of the latter. In an action upon the bond, *held*, that it embraced

Statement of case.

within its terms the premiums collected under both contracts, and that it was immaterial that defendants had no knowledge as to the second. *Bigelow* v. *Benton* (14 Barb., 123), *Henderson* v. *Marvin* (31 Barb., 297), *Wilson* v. *Edwards* (6 Lans., 134), *Bagley* v. *Clarke* (7 Bosw., 94), and *Grant* v. *Smith* (46 N. Y., 93) distinguished.

(Argued May 24, 1876; decided June 6, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon the report of a referee, and granting a new trial.

This action was upon a bond executed by the defendant De Witt W. Clinton as principal, and by the other defendants as sureties, conditioned as follows:

"The condition of this obligation is such that, whereas the above bounden De Witt W. Clinton, of Buffalo, New York, has been appointed as an agent of the said Western New York Life Insurance Company, for the purpose of procuring applications for life insurance and collecting premiums thereon; now, if the said De Witt W. Clinton shall well and truly pay or hand over to said company all moneys belonging to said company, which shall at any time be received by him, as also all moneys which he now owes, or hereafter may owe, said company, on or before the first day of each month, and shall faithfully discharge the duties as agent of said company, then this obligation shall be void, otherwise to remain in full force and effect."

At or prior to the time of the execution and delivery of the bond, two contracts had been made and entered into by and between plaintiff and said Clinton. By the first contract, Clinton was appointed general agent of plaintiff, for a specified territory, "to procure applications for insurances upon lives of individuals for the term of life, and for endowments, short-time insurances and annuities in said company, and to effect all kinds of insurance authorized by said company; and the said party of the second part hereby agrees to act as agent of said company in procuring insurances as aforesaid, in the

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above-mentioned territory," Clinton to receive and retain a specified per centage as "commissions on premiums and renewal premiums paid to said company upon business done by him or through his agency," he agreeing, at the end of each month, to account for, and pay over, all moneys collected, less commissions and expenses. By the second contract, plaintiff agreed to allow Clinton commissions on all moneys collected by him on renewals of policies issued or negotiated by one J. L. McKeever, a former general agent of the company, whose place Clinton took and whose right to commissions on such renewal premiums the company had purchased; the per centage, however, with the residue of such premium collected, was to be paid in to the company, to be applied "toward the purchase of the said renewals," and as soon as Clinton paid the sum of $1,000 and interest, plaintiff agreed to assign and transfer to Clinton all of said renewals and afterwards to pay him the same commissions as were before paid to McKeever. Clinton agreed to collect the said renewal premiums and to pay over the same as specified.

The referee found that all of said instruments were executed and delivered in pursuance of a prior parol agreement between plaintiff and Clinton by which his agency, both as to new policies and the McKeever renewals, was agreed upon.

Clinton left plaintiff's employment October 2, 1871, at which time he had in his hands moneys collected, both on policies issued through his agency and on the McKeever renewals, which he did not pay over as agreed. The referee found, as conclusion of law, that defendants were liable for the whole of said moneys, with interest, and directed judgment accordingly.

Mr. Tarbox for the appellant. The fact that the sureties were misled or deceived by their principal as to the nature and extent of his contract with plaintiffs, is not available as a defence to this action. (*Casoni* v. *Jerome*, 58 N. Y., 315–321; *McWilliams* v. *Mason*, 31 id., 294; *McNaught* v. *McClaughry*, 42 id., 25.) It was not plaintiff's duty to notify

the sureties that their principal had retained some of its money in his hands. (*Orme* v. *Young*, 1 Holt N. P., 84; 2 J. J. Marsh, 564; *P., Ft. W. and C. R. R. Co.* v. *Schaeffer*, 8 Am. L. Reg. [N. S.], 110; *Looney* v. *Hughes*, 26 N. Y., 522; *Schræppell* v. *Shaw*, 3 id., 446; *B. Riv. Bk.* v. *Page*, 44 id., 453; *Albany D. C.* v. *Vedder*, 14 Wend., 165; *People* v. *Berner*, 13 J. R., 383; *McKecknie* v. *Ward*, 58 N. Y., 541; *At. and P. Tel. Co.* v. *Barnes*, 7 J. & S., 40.)

E. Countryman for the respondents. No intendments or implications will be made in construing the terms of the contract of the sureties not clearly embraced in the language used in their bond. (*Dobbin* v. *Bradley*, 17 Wend., 423; *Walrath* v. *Thompson*, 6 Hill, 540; 2 N. Y., 185; *Miller* v. *Stewart*, 9 Wheat., 681; *Grant* v. *Smith*, 46 N. Y., 93.) The sureties must be held according to the tenor of their contract or not at all. (*Bigelow* v. *Benton*, 14 Barb., 123; *Henderson* v. *Marvin*, 31 id., 297; *Wilson* v. *Edwards*, 6 Lans., 134; *Bagley* v. *Clark*, 7 Bosw., 94; *Grant* v. *Smith*, 46 N. Y., 93; *Bonar* v. *McDonald*, 3 H. L. Cas., 226; *D. and M. Co.* v. *Lawrence*, 3 T. & C., 386.) The referee erred in rejecting the evidence offered that the sureties were informed that the bond merely referred to the first contract with plaintiff. (*Ryerss* v. *Wheeler*, 22 Wend., 148; *Forman* v. *Stebbins*, 4 Hill, 181; *Snell* v. *Snell*, 3 Abb., 426, 430; *Godfrey* v. *Warner*, Lalor's Sup., 32; *Hunt* v. *Maybee*, 7 N. Y., 266, 270.) Plaintiff could not, in any event, recover as against the sureties for any moneys retained by their principal after making his first report in July, 1871. (*Philips* v. *Foxall*, 3 L. R., 7 Q. B., 666; *Sanderson* v. *Astor*, 4 L. R., 8 Exch., 73; *Harrington* v. *First Nat. Bk.*, 1 T. & C., 361; *Burgess* v. *Eve*, L. R., 13 Eq., 450; *Hopkinson* v. *Rolt*, 9 H. L. Cas., 514.)

MILLER, J. The condition of the bond in suit recited that the principal had been appointed an agent of the plaintiffs "for the purpose of procuring applications for life insur

ance and collecting premiums thereon," and provided for the payment to the plaintiff of all moneys belonging to the company and the faithful discharge of the duties of such agent. At and prior to the time of the delivery of said bond two instruments had been executed and exchanged between the parties. By one of them the plaintiff appointed De Witt W. Clinton an agent for a territory, which was designated, to procure "applications for insurances," and "to effect all kind of insurances," and provided for the payment of commissions upon "premiums and renewal premiums," and for the forwarding of applications and the payment of moneys received. By the other instrument the plaintiff agreed to allow said Clinton, as agent, a commission upon moneys collected on renewals of policies issued or negotiated through the agency of J. L. McKeever, which was to be applied towards the purchase of the said renewals. And upon payment of the sum of $1,000 the plaintiff agreed to transfer all of said renewals to Clinton, and afterwards to pay him the same commissions as were paid to McKeever.

It is objected that the bond does not include, by its terms, the moneys collected on the renewal premiums, but only such premiums as are embraced within the provisions of the first-mentioned agreement. This position is not well taken. The moneys received are not upon the applications for insurance, but for premiums upon policies and the renewals of the same. Those received upon the McKeever renewals were clearly included within the bond, for they were renewal premiums on policies, and the language of the bond covers this class of premiums as well as all others. It was not a contract of sale, but a mere agreement for a transfer of a right to collect these premiums upon certain conditions which were agreed upon. Even if the effect was, when the amount agreed upon was paid, to transfer these renewal premiums, it is difficult to see how the defendants could be injured thereby. If no transfer was to be made, and the agent had agreed to collect the premiums and pay them over, after deducting his commissions, the defendants would have been clearly liable, and it does not

affect such liability, because the agent was to pay a certain sum for the privilege of collecting these renewal premiums. Conceding the application of the rule that a claim against sureties *is strictissimi juris*, and that no implications are to be made in giving construction to the terms of a contract not clearly embraced within the *language used*, the renewal premiums mentioned in the second instrument were fairly within the import and true meaning of the bond. And even if it may be considered that there is an ambiguity in regard to the construction to be placed upon the bond, we have a right to consider, in interpreting its meaning, all the surrounding circumstances and the relations of the parties as they existed at the time of its execution and delivery. (*Griffiths* v. *Hardenbergh*, 41 N. Y., 464; *Matter of N. Y. Central R. R. Co.*, 49 id., 414.) Applying this rule to the present case, there is no ground for the assumption that the bond was intended to cover only a portion of the business which was to be transacted by the agent for the company.

Nor does it relieve the defendants from liability upon the bond, because the sureties had no knowledge of the second agreement until after the execution of the bond. Even if they were misled by the principal, at whose request the bond was executed, as to the character and extent of the obligation assumed, it is no valid defence to this action, unless it appears that the plaintiff was a party to the fraud practiced upon the defendants. (*Casoni* v. *Jerome*, 58 N. Y., 315, 321; *McWilliams* v. *Mason*, 31 id., 294.) The position that the obligee in a bond is bound to seek out the sureties and explain to them the nature and extent of their obligation at the point of losing the security, or that he is to be held responsible for the fraudulent representations or concealment of the principal of any of the facts, is somewhat novel, and is not upheld by any adjudged case. It is the duty of the sureties to look out for themselves and ascertain the nature of the obligation embraced in the undertaking, and any other rule would not only work serious inconvenience, but render securities of this character of but

little, if of any, value. The construction placed upon the bond in question does not, in my opinion, extend or enlarge the scope of the agreement beyond its actual import and the real intention of the parties.

We have been referred to a class of cases to sustain the position that the bond in question does not cover the liability incurred under the second agreement, but, after a careful examination, we are unable to discover that they sustain the doctrine contended for, as will be seen by a brief reference to the leading adjudications relied upon. In *Bigelow* v. *Benton*, (14 Barb., 123) the defendant guaranteed the shipment and delivery to the plaintiffs, by one Durkee, of a barrel of superfine flour for every four and a-half bushels (two hundred and seventy pounds) of good wheat he received from them, and a barrel of corn meal for every two hundred and forty pounds of Indian corn received from them. The contract between plaintiffs and Durkee bound Durkee to deliver a barrel of flour for a less quantity of wheat than was required by the contract of guaranty, and that the corn meal delivered should be "kiln dried." It was held that the surety was not liable. It is apparent that there was an essential difference between the two contracts, and that the latter was not contemplated by, or embraced within, the terms of the guaranty. In *Henderson* v. *Marvin* (31 Barb., 297) the guaranty was on a credit of six months, and the credit was extended as to part of the amount, and shortened as to a part, by taking a third party's promissory notes, having different times to run, and it was held that the guarantor was discharged. This was a plain variation from the terms of the guaranty, which, necessarily, rendered it inoperative. In *Wilson* v. *Edwards* (6 Lans., 134) sureties for the performance of a contract for the sale of goods on commission were held not to be liable for the payment of moneys received by the principal for goods consigned to him at an agreed price. Here, also, was a material variation of the terms of the contract which the sureties had not agreed to be liable for. In *Bagley* v. *Clarke* (7 Bosw., 94) the sureties

covenanted to be responsible for the performance of a contract which bound the principal to serve the plaintiff for a term named and no one else, at a fixed salary. This was changed into a contract making the rate of compensation depend upon the quantity of work, making the term of service uncertain, and binding the principal to obey the commands of two other persons in connection with the plaintiff.

Here was a plain and palpable departure from the original undertaking, which discharged the sureties, and the court could not hold otherwise, than that no liability existed. In *Grant* v. *Smith* (46 N. Y., 93), the guaranty was for the price of a steam engine and two boilers of a given capacity and power, and without the assent of the surety an engine with three boilers and of a greater capacity and power at an additional price was substituted. It was properly decided that this was a material change, imposing entirely new obligations upon the contracting parties and discharged the surety from any liability. It is manifest that none of the cases examined present the characteristic of the case now considered, and in each one of them there was a clear variation from the express conditions of the contract of guaranty. As we have already seen the condition of the bond in question was intended to cover and plainly comprehends the premiums mentioned in both agreements, and the claim of the plaintiff was clearly within its terms. The cases cited, therefore, have no application and furnish no grounds for reversing the judgment of the referee. It follows that the offer to show that the sureties were informed only of the first contract could have no bearing on the case, and was properly excluded.

There was no error upon the trial before the referee and the order of the General Term must be reversed and that entered upon the referee's report affirmed, with costs.

All concur.

Order reversed and judgment accordingly.

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not allowed to be out of repair, but was constructed with the best material for sidewalks to be found in the country; that it was well laid; that the common council having established the grade, and it having been built in accordance with that grade, it is not the province of the jury to review the judicial actions of the common council; that the common council had the right to exercise a discretion in fixing the grade, and that, having exercised that discretion, the city could not be held liable."

Upon this ground the court granted the motion, to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

Nathaniel C. Moak for the appellant. Plaintiff cannot now complain that the case should have been submitted to the jury. (*Mallory* v. *Tioga, etc.*, 5 Abb. [N. S.], 420; *Clark* v. *Mayor, etc.*, 24 How. Pr., 333; *Winchell* v. *Hicks*, 18 N. Y., 558; *O'Neil* v. *James*, 43 id., 85; *Barnes* v. *Perine*, 12 id., 18; *People* v. *Cook*, 8 id., 78; *Dows* v. *Bush*, 28 Barb., 180; *Beekman* v. *Bond*, 17 Wend., 444; *Shafer* v. *Guest*, 35 How Pr., 189.) The common council having acted judicially in establishing the grade of the sidewalk, defendant is not liable. (*Mills* v. *City of B'klyn*, 32 N. Y., 497; *Wilson* v. *Mayor, etc.*, 1 Den., 595; *Kavanagh* v. *City of Brooklyn*, 38 Barb., 232; *Radcliff* v. *Mayor, etc.*, 4 Comst., 195; *White* v. *Corpor. Yazoo City*, 27 Miss., 357; *Lansing* v. *Smith*, 8 Cow., 146; *St. Louis* v. *Gurno*, 12 Mo., 414; *Lambar* v. *City St. Louis*, 15 id., 610; *Alexander* v. *City Milwaukee*, 16 Wis., 247; *O'Conner* v. *City Pittsburgh*, 18 Penn., 187; *Holmes* v. *Mayor of Knoxville*, 1 Humph., 403; *Clark* v. *City of Wilmington*, 5 Har., 243; *Roberts* v. *City of Chicago*, 26 Ill., 249; *Sutton* v. *Clark*, 6 Taunt., 29; *Fitch* v. *Comrs., etc.*, 22 Wend., 135; *People* v. *Comrs., etc.*, 27 Barb., 94, 100; *Jenkins* v. *Waldron*, 11 J. R., 120; *Vanderhuyden* v. *Young*, id., 159; *Harman* v. *Brotherson*, 1 Den., 539; *Freeman* v. *Cornwall*, 10 J. R., 470; Dil. on Mun. Corp. [1st ed.], 214, § 177; *Duke* v. *Mayor, etc.*, 20 Ga., 635.)

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F. D. Wright for the respondent. Facts proved but not pleaded afford no defence. (*Allen* v. *Mer. Ins. Co.*, 46 Barb., 657; 20 id., 468; 6 N. Y., 179; 2 id., 606; 12 id., 9; 25 id., 266.) The exception to the decision of the court granting the motion for a nonsuit was sufficient. (*Sheldon* v. *At. F. Ins. Co.*, 26 N. Y., 460; *Stone* v. *Flower*, 47 id., 566; *Frecking* v. *Rolland*, 53 id., 422.) A municipal corporation having decided to construct and undertake public improvements acts ministerially and is liable in damages to a person injured by the unskillful, negligent or unsafe construction of them or failure to keep them in proper condition. (S. & R. on Neg. [3d ed., 1874], 183, § 124; 4 Abb. Dig. [new ed.], 460, § 144; *Roch. W. L. Co.* v. *City of Rochester*, 3 N. Y., 463; *Huston* v. *Mayor*, 9 id., 163; *Conrad* v. *Village of Ithaca*, 16 id., 158; *Weeks* v. *Trustees, etc.*, id., 161; *Barton* v. *City of Syracuse*, 37 Barb., 293; 36 N. Y., 54; *Lewenthal* v. *Mayor, etc.*, 61 Barb., 511; Alb. L. J., Dec. 26, 1874, pp. 401–403.) Defendant was bound to construct its streets and sidewalks safely and keep them in safe condition. (2 Dil. on Mun. Corp., 911, 912, §§ 789–791; Whart. on Law of Neg. [1874], § 772; 4 Abb. Dig. [new ed.], 285, § 35; *Wallace* v. *Mayor, etc.*, 18 How. Pr., 169; 2 Hilt., 440; *Morey* v. *City of Troy*, 61 Barb., 598; *Allentown* v. *Kramer*, 73 Penn., 406; *Chicago City* v. *Robbins*, 2 Black, 422; Cook's Highway Laws [1870], 205; *Tripp* v. *Seymour*, 37 Me., 250; 2 Add. on Torts [D. & B. ed.], 1311, 1312; *Wilson* v. *City of Watertown*, 5 Parson's S. C. R., 579; 3 Hun, 508; *Hudson* v. *Mayor, etc.*, 9 N. Y., 163; *Davenport* v. *Ruckman*, 37 id., 568; *Berme* v. *Dist. Columbia*, 13 Alb. L. J., 274.) A municipal corporation has no power to make or maintain a nuisance, and if it does is liable for injuries resulting therefrom. (*Mills* v. *City of Bklyn.*, 32 Barb., 500; *S. Bridge Co.* v. *L. Bd. of Health*, 8 E. & B., 801; Whart. on Law of Neg., 262, §§ 262, 266; Viner's Abr., Nuisance, F.; 2 Dil. on Corp., 624, § 521; *People* v. *Corp. of Albany*, 11 Wend., 542; *City of N. Y.* v. *Furze*, 3 Hill, 614; 3 Black. Com., 215; 2 Greenl. Ev., 381, § 415; 37 N. Y., 568; 16 Abb., 341; *Mills* v. *City of*

Bklyn., 32 N. Y., 489; *Kavanaugh* v. *City of Bklyn.*, 38 Barb., 232; *Wilson* v. *Mayor, etc.*, 1 Den., 595.)

ALLEN, J. Every question is open to the plaintiff which can fairly be raised upon the record. If in any view of the evidence a verdict might have been rendered for the plaintiff or if there were questions of fact which might have been determined for the plaintiff and which, if determined in her favor, would have entitled her to recover, the case should not have been taken from the jury by a nonsuit. The plaintiff did not assent to any proposition of fact assumed either by the counsel for the defendant or the court, and is not concluded by omitting to request that the whole case or any particular question of fact should be submitted to the jury. She neither requested or consented that the court should pass upon the facts and, the nonsuit having been granted *in invitum*, she has a right to controvert every proposition, whether of fact or of law, upon which the nonsuit was based. In the cases in which a different rule has been held the party has by his own action, directly or indirectly, assumed that there was no disputed question of fact for the jury by treating the questions as purely legal and acquiescing in the disposal of them by the court. *Barnes* v. *Perine* (2 Kern., 18), *Winchell* v. *Hicks* (18 N. Y., 558), *O'Neill* v. *James* (43 id., 84), and the other authorities relied upon by the counsel for the appellant, were cases of this character. Where a party is nonsuited upon the motion of his adversary, over his objection and exception, he may insist, upon a review of the decision, not only that the judge at Circuit erred in the application of the law to the facts as viewed by him but that he erred in his conclusions of fact or that there were disputed questions of fact which should have been submitted to the jury.

The duty of the defendant to keep the streets and sidewalks in the city, including that upon State street, in good repair and to have the sidewalks constructed properly and so as to be reasonably safe for public travel thereon is expressly admitted by the answer. The only material fact in issue was as to

the proper construction of the sidewalk at the place of the injury, and whether it was in good order and repair and constructed upon a proper and reasonably safe grade. The plaintiff was nonsuited upon the ground that the common council of the city, in the performance of what was termed a "quasi-judicial" act, had established the grade of the sidewalk and that it had been built in accordance with that grade and that the jury could not review the "judicial actions" of the common council, who had a discretion in the matter, and that the city could not be held liable for the mistaken exercise of that discretion.

It is very doubtful whether, under the issue made by the pleadings, this question was properly in the case. It is also questionable whether, the absolute duty being imposed by law upon the city to construct and keep in repair the sidewalks, the city would not be liable to any one traveling thereon for injuries resulting from an improper construction of the walks, whether in respect to grade, material or other thing; in other words whether, the duty being conceded, it is not absolute to make them reasonably safe for public travel. The cases which hold that individuals are not entitled to compensation for incidental and consequential damages to property, resulting from public works constructed under authority of law and in the exercise of a discretion committed to public officers, are not necessarily decisive of the question as stated. Such are the cases relied upon by the counsel for the appellant. (*Childs* v. *Boston*, 4 Allen, 41; *Wilson* v. *Mayor, etc., New York*, 1 Den., 595; *Radcliff's Exrs.* v. *The Mayor, etc., Brooklyn*, 4 Com., 195; *Mills* v. *Brooklyn*, 32 Barb., 489.) Upon the evidence in this case this question, so earnestly and ably discussed by the counsel for the appellant, is not presented. The evidence comes far short of proving that the sidewalk, at the particular place of the injury, was upon the grade or at an angle as fixed by the common council; but on the contrary it is very evident that it was laid at an entirely different angle and grade from that which had been ordered. The evidence is that the walk north of the place in

question had been laid at a grade fixed sometime previous; that before the walk south of the place of injury and extending to Genesee street was built, the latter street had been raised and a different grade of State street north had been made necessary, and had been fixed by the common council. Upon the construction of the sidewalk from the intersection of State and Genesee streets upon the new grade it became necessary either to relay the walk to the north or make a connection between the two sections of the walk by laying a space of about four feet at a grade and angle much greater and sharper than that on either side. Mr. Carpenter, a witness, states when, by whom, under what circumstances and for what reasons the stone bridging this four feet and connecting the different levels of the two sections of the walk was placed, and negatives the idea that it was pursuant to the directions of the common council and to conform that part of the walk to the line or level fixed by it. It would require record evidence to convict a body exercising the powers of a local legislature of the superlative folly of directing a sidewalk to be built with the different stones of which it was made placed at different angles and degrees of inclination, or to be built in sections of different grades, and to overcome the discrepancy by the insertion of a stone at an inclination dangerous to persons using it in the dark or when it was wet. That would not be to grade the walk, which consists in reducing the street to such a degree of inclination as to fit it for use by those having occasion to pass over it. The defect in this walk was in the construction and not in the act of the council in determining and directing the grade. It was not done by authority of the common council, but by direction of one of its members and to relieve a lot owner from relaying the walk opposite his premises; and there was proof tending to show that it was unsafe and insecure for persons passing over it if their attention was not particularly attracted to the abruptness of the change in grade; that it had been suffered to remain in that condition for several years; and that casualties similar to that which befell the

plaintiff had happened on more than one occasion. The common council had performed its duty in fixing a grade for the sidewalk upon the whole length of the block, but they had suffered it to be built in part upon an entirely different grade, and this difference in grade between the different parts to be overcome by a sudden and abrupt descent from the upper to the lower level. It cannot be claimed that the natural formation of the street was such as to justify a resort to any such expedient; neither can it be assumed that any grade which a common council would fix for such a place would authorize different parts of the same walk to be at different angles, making a dangerous descent from one part to the other necessary. The defect in the sidewalk resulting in the injury to the plaintiff was not in consequence of the improper action of the common council in fixing a grade or in the grade actually fixed, but the improper and defective manner of constructing the sidewalk with a view to evade and thwart the action of the common council, and in violation of its requirement. The principal point taken by the counsel for the appellant, and that mainly relied upon by him, being out of the case, it follows that it should have been submitted to the jury, that they might determine whether the sidewalk was in proper repair and in a safe condition, and whether the injury to the plaintiff was caused solely by such defect in the sidewalk, or whether her own negligence and want of care contributed to it, and it was error to nonsuit.

The case is directly within a large class of cases holding that for any neglect or omission of duty on the part of municipal corporations in keeping and maintaining the streets and sidewalks in safe condition for use, in the usual mode, by travelers, the corporation is liable for any injuries to individuals resulting therefrom. (Dillon on Munic. Corp., 753; *Hutson* v. *New York*, 5 Seld., 163; *Weet* v. *Brockport*, 16 N. Y., 161; *Rochester White Lead Co.* v. *Rochester*, 3 Com., 463; *Conrad* v. *Ithaca*, 16 N. Y., 159; *Barton* v. *Syracuse*, 37 Barb., 292; Aff., 36 N. Y., 54; *Chicago* v. *Robins*, 2 Black, 418; *Diveny* v. *Elmira*, 51 N. Y. 506; *Hines* v.

Lockport, 50 id., 236.) This walk had been permitted to remain for a long term in its unsafe condition, and was constructed under the eye, if not under the direction, of the ministerial officers of the city charged with the duty of keeping and maintaining the streets in repair, and no question could be made as to the liability of the city for neglect of duty if the walk was in fact in an unsafe condition; and whether it was in such unsafe condition was, upon the evidence, a proper question for the jury.

The order granting a new trial must be affirmed and judgment absolute for the plaintiff.

All concur.

Order affirmed and judgment accordingly.

THE PEOPLE ex rel. EDWARD S. STOKES, Appellant, *v.* THE WARDEN OF THE STATE PRISON AT SING SING, Respondent.

In legal view, punishment for a crime does not begin until after the criminal has been convicted and sentenced; any imprisonment prior to sentence will not enure to his benefit as part of the punishment.

As to whether it is within the province of the courts to award to a prisoner in a State prison the time to which he is entitled for good conduct, *quære*.

A court, in imposing sentence, may take into consideration the time the convict has been in custody awaiting trial, but it is matter of discretion only.

On the sixth of January, 1873, the relator was convicted of murder and sentenced to be hanged. On writ of error, proceedings were stayed, the judgment was reversed, and a *venire de novo* ordered. He was again tried October 29, 1873, having meanwhile been confined in jail; he was convicted on the second trial of manslaughter in the third degree, and sentenced to imprisonment in State prison at hard labor for four years, the maximum punishment for that crime; he was put into a State prison November 1, 1873 On February 5, 1875, he was brought out on writ of *habeas corpus*, and claimed that the time of imprisonment between the first and the second trials should be taken as part of his sentence; that this, with the time served in State prison, and the

abatement earned by good conduct, in accordance with statutes (chap. 417, Laws of 1862; chap. 415, Laws of 1863; chap. 321, Laws of 1864; chap. 451, Laws of 1874), made up the full term of imprisonment. *Held*, that the claim was untenable; and that the relater was properly remanded.

(Argued May 26, 1876; decided June 6, 1876.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department dismissing a writ of *certiorari* brought to review the decision of a justice of said court, which dismissed a writ of *habeas corpus* issued upon petition of relator and remanded him to the custody of the warden of the State prison at Sing Sing.

The facts appear sufficiently in the opinion.

Charles W. Brooke for the appellant.

Benj. K. Phelps for the respondent. The question of the allowance of time for good behavior is one for the determination of the executive and not for the courts. (Laws 1862, chap. 417, p. 748; 5 Edms. Stat., 204; Laws 1863, chap. 415, p. 708; 6 Edms. Stat., 148; Laws 1864, chap. 321, p. 763; 6 Edms. Stat., 255; Laws 1874, chap. 451, p 594, § 12.)

FOLGER, J. Before the 6th day of January, 1873, the relator had been indicted and put on trial for the killing of James Fisk, Jr. On that day he was, on the verdict of a jury, adjudged guilty of murder and sentenced to be hung on the twenty-eighth day of February, then next. The sentence was not executed. The relator had brought his writ of error, and proceedings had been stayed. The judgment was reversed by this court, on the 10th of June, 1873, and a *venire de novo* ordered. On the 29th October, 1873, the relator was again put upon trial under the same indictment, and was, on the verdict of a jury, adjudged guilty of manslaughter in the third degree. In the meantime, he had lain in jail, in New York county. He was, on that day, sentenced to be imprisoned in the State prison at hard labor, for the

term of four years. This term of imprisonment is the *maximum* punishment for that crime. He was actually for the first time put into a State prison at Sing Sing, on the 1st day of November, 1873, and has been kept there ever since, it is to be assumed, at hard labor. On the 14th January, 1875, the agent and warden of that prison made a certificate dated that day, that the relator had faithfully performed such work and labor as had been assigned to him, and that his conduct from the 1st November, 1873, to the date of the certificate had been good, and in adherence and obedience to the prison officials and discipline. On the 5th February, 1876, he was brought out of the prison by writ of *habeas corpus*, and claimed to be discharged from imprisonment and set at liberty. This was denied and he was remanded.

The sole claim for his discharge is, that he has suffered imprisonment in accordance with the sentence passed upon him, for the full term of it, so far as in law it is now capable of infliction.

It is at once apparent, that from 29th October, 1873, to 5th February, 1876, is not a term of four years. So, it is plain, that the relator has not been in a State prison at hard labor for that length of time, and has not thus satisfied the sentence. But the relator claims that the time from the 6th of January, 1873, to 29th of October, 1873, during which he was kept in the New York county jail, is to be taken as part of the four years of his sentence; and he further claims, that he has in accordance with certain statutes (see laws of 1862, chap. 417; Laws of 1863, chap. 415; Laws of 1864, chap. 321; Laws of 1874, chap. 451, p. 598, § 12), earned by good conduct in State prison, an abatement from the term of his sentence. It is conceded, that these two, together with the time for which he has been actually kept in the State prison, will equal four years. Still we cannot yield to this claim of the relator. His counsel is obliged to admit that the conviction for manslaughter was legal, that the court of Oyer and Terminer had thereupon the power to impose upon him a sentence of imprisonment in the State prison, at

hard labor, for four years. The conviction being legal and the sentence in accordance with law, it follows that the State may exact from him the full endurance of the sentence and of every part of it. He may not be relieved until he has shown full endurance, or executive pardon, or what is tantamount thereto. Nor may he claim relief as matter of right, until, according to the letter of it, he has shown full endurance.

Punishment for the commission of crime is that pain, penalty or forfeiture which the law exacts, and the criminal pays or suffers for the offence. In legal view, it cannot be said to have been exacted, nor to have been endured or begun to be endured, until the commission of the particular crime has been legally determined, and the particular criminal legally ascertained; nor until the due sentence, that is, the judicial fixing and utterance, of the definite kind, amount, or period of punishment has been authoritatively, and in due form of law and proceeding, pronounced upon him for his crime, after his conviction therefor. Punishment is a consequence of crime, to be sure, but in a legal view, it is the immediate consequence of only a conviction of crime. Hence, any pain or penalty which the offender has suffered before conviction and before sentence has been pronounced upon him is illegal, or is due to some demand of the law other than that based upon his conviction. In either case, it fails to enure to his benefit as part of that due punishment which the law exacts, by reason of his conviction and of the sentence passed upon him.

Again, as a general rule, from which this case is not an exception, no pain or deprivation which a person suffers in accordance with law, can be made, as of his right, to answer at once two distinct and different requirements of the law. The imprisonment of the relator in the county jail was by virtue of one requirement of law, to wit: that persons indicted for murder may be kept in close custody until their trial therefor is ended. It was for that reason a lawful imprisonment. It could have been, for that reason, justified by the

keeper of the county jail. It was a satisfaction, then, of that specific legal exaction, quite another exaction than that by virtue of this sentence, and it was a satisfaction of that other legal exaction only; when, after that, arose the legal exaction by virtue of the sentence upon this conviction, the imprisonment which the relator had undergone in answer to that other requirement, had been applied and spent in satisfying it, and may not be now applied in satisfaction of this later demand of the law. The learned counsel for the relator admitted, upon the argument, that the imprisonment in the county jail was legal, and that the relator could not have obtained a discharge therefrom. That period of imprisonment was then, appropriated and consumed by some demand of the law, other than the conviction of October 29, 1873, and the sentence thereupon, and does not now exist, so as to be applied in satisfaction of the latter. Moreover, important parts of the sentence are the place of imprisonment, to wit: in a State prison, and the manner of detention there, to wit: at hard labor. When the relator lay in the county jail, he was not enduring these parts of the sentence; he was not in State prison; he was not at labor. How then can the time he lay in the county jail be reckoned a part of the time for which the law adjudged him to be at labor in the State prison? Doubtless, a court when imposing sentence of imprisonment may consider in mitigation of the severity of it, the time for which the convict has been in custody while awaiting trial. And this is the only force of the instances brought forward by the learned counsel. It is matter of discretion only, and the discretion is exercised upon that fact, the same as upon any of the circumstances of the case which may be urged upon the court for mitigation of punishment.

If the time during which the relator was confined in the county jail is not allowed to him, the time which should be awarded to him for good conduct in State prison will not now avail to procure his discharge. Hence, it is not needful that we consider at length, whether the awarding thereof is within the province of the courts. It will suffice here to say,

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that the learned counsel for the relator has failed to convince us that the courts may interfere to make that award. There may be question whether it is not a matter for the executive alone.

The order of the General Term should be affirmed.

All concur.

Order affirmed.

ANDREW S. WELLER, Respondent, *v.* JOSEPH H. TUTHILL, Appellant.

A company had been organized, composed of individuals owning oil lands, under the name of the E. P. Co., and all of its stock subscribed for. It was the intention to have it incorporated on the basis of the property so held, but before this was done defendant, who was a subscriber to the stock, agreed with plaintiff that if the latter would pay to the treasurer $500 he would see that plaintiff had a half share of the stock. Plaintiff paid the money, which was credited to defendant. A corporation was subsequently duly incorporated identical as to shareholders and property, but named the R. F. P. Co. No stock was transferred to plaintiff and no demand therefor was made by him. The R. F. P. Co. becoming embarrassed its property was, by direction of the directors, sold at auction and bid in by H. for the benefit of the stockholders. Defendant paid his proportion of the sum bid. In an action to recover the $500, *held*, that, to put defendant in default, a demand by plaintiff of the stock was requisite, or proof given that it was out of defendant's power to transfer it; that defendant's contract would have been performed by a transfer of stock in the corporation succeeding to the property of the E. P. Co.; and that a transfer by defendant to plaintiff of an interest in the property held by H. in trust, equal to the interest defendant contracted to convey, would have satisfied any equitable claim of plaintiff and have been a legal performance of the contract.

(Argued May 26, 1876; decided June 6, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover the sum of $500 alleged

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to have been paid by plaintiff, for the use and benefit of defendant, at his request.

The referee found, in substance, that, prior to the 3d day of March, 1865, a number of persons at the village of Ellenville and that vicinity, owning oil lands, associated themselves together, calling themselves, or their association, the Ellenville Petroleum Company. The association was not organized as a corporation; but they provided for a capital stock, divided it into shares of $1,000 each, and subscribed the amount of the capital stock. They had officers known as president, secretary and treasurer, and kept books and accounts of their transactions. Defendant was the president.

The defendant was the holder of nine and one-half shares of the so-called original stock of the said company. Upon plaintiff's complaining to defendant that he had not been permitted to take an interest in the company, defendant told him that there was a half share which he (defendant) could control, and if plaintiff would send to him, or to the treasurer, his check for $500, he would see that plaintiff had a half share of the stock. Plaintiff accordingly, on March 3, 1865, sent his check to the treasurer for that amount, which was credited to defendant and applied toward payment for his stock. Afterwards all the shares of the original stock were doubled, thus giving the defendant nineteen shares.

That, on or about the 17th day of June, 1865, a corporation was duly organized under the laws of the State of Pennsylvania, and became a corporation by and under the name of The Ross Farm Petroleum Company. The defendant had nineteen shares of stock, of $1,000 each, in the last above named company or corporation, being for the same stock held by him in the Ellenville Petroleum Company, and each of the subscribers or shareholders in the so-called Ellenville Petroleum Company, took the same number of shares of stock in the Ross Farm Petroleum Company. Both companies, so far as related to its shareholders and property, were identical. That, on the 10th of September, 1866, the Ross Farm Petroleum Company passed a resolution that its property be

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sold at auction, and the company be dissolved. The property was, on the same day, sold at auction to Jacob Hermance, for $4,500. Hermance sent a notice to the stockholders that he bought for their benefit, and held the property, in trust, for all who would pay their proportion of the bid. Defendant paid his proportion for the stock so held by him. That no interest or share, in either of the companies, was ever transferred to plaintiff or tendered to him, nor has he ever demanded the same. As conclusion of law, the referee found that plaintiff was entitled to recover the same. Further facts appear in the opinion.

A. Schoonmaker, Jr., for the appellant. Plaintiff was an equitable stockholder in the company. (*Thorpe* v. *Woodhull*, 1 Sand. Ch., 411; *Spear* v. *Crawford*, 14 Wend., 20; *B. and N. Y. C. R. R. Co.* v. *Dudley*, 14 N. Y., 347; *Burr* v. *Wilcox*, 22 id., 551; *Stover* v. *Flack*, 30 id., 64; *Chester Glass Co.* v. *Dewey*, 16 Mass., 95; *Ag. Bk.* v. *Burr*, 24 Me., 256; *Harlem Canal Co.* v. *Seixas*, 2 Hall, 504.) He was entitled to a certificate of his stock, and which, if refused, he could sue the company for, and recover the highest market price of the stock at any time after the refusal. (*Com. Bk. of Buffalo* v. *Kortright*, 22 Wend., 348.) There was no cause of action against the defendant upon the facts proven. (*Osby* v. *Conant*, 5 Lans., 310; *Patrick* v. *Metcalf*, 37 N. Y., 332; *Butterworth* v. *Gould*, 41 id., 450; *Henry* v. *Wilkes*, 37 id., 562; *Colvin* v. *Holbrook*, 2 id., 126; *Hall* v. *Landesdale*, 46 id., 70; *Denny* v. *Man. Co.*, 2 Den., 115; 5 id., 639.) Plaintiff could only recover the market value of a-half share of the stock. (*Wheeler* v. *Allen*, 40 Barb., 460.)

Charles A. Fowler for the respondent. No demand for the stock was necessary. (*Dumonds* v. *Carpenter*, 3 J. R., 183; *McNielly* v. *Richardson*, 4 Cow., 607; *H. and N. H. R. R. Co.* v. *Croswell*, 5 Hill, 383, 386; *Blatchford* v. *Ross*, 37 How. Pr., 110; *Frothingham* v. *Barney*, 6 Hun, 366, 372.) Plaintiff may recover back the money paid by him to defendant. (*Churchill* v. *Stone*, 58 Barb., 233.)

Opinion of the Court, per *Curiam*.

Per Curiam. The Ellenville Petroleum Company was organized, and the stock fully subscribed for, before the plaintiff paid to the treasurer the money which he seeks to recover in this action.

The referee finds that the plaintiff complained to the defendant that he had not been permitted to take a share or interest in the company, and the defendant then said to him, that there was a half share he could control, and if the plaintiff would send to him or the treasurer $500, the nominal value of the half share, he would see that the plaintiff had a half share of the stock. The plaintiff on the 3d day of March, 1865, paid the sum mentioned to the treasurer, who credited it to the defendant. It was understood between the parties that the stock which the plaintiff was to have was part of that alloted to the defendant.

The Ellenville company was composed of individuals who owned oil lands in Pennsylvania. The company was not incorporated. The capital stock was fixed at a certain sum, and was divided into shares of $1,000 each, of which the defendant was entitled to nine and a half shares. It was however the intention of the association to organize as a corporation, and this intention existed before the contract was made between the plaintiff and defendant. This is apparent from the proceedings of the company as shown by the minutes or record of the meetings of the associates. The corporation was formed under the Pennsylvania statute, in June, 1865. The stockholders in the original association were the stockholders in the corporation, and the property held by the associates was transferred to the corporation. The referee finds that both companies, so far as related to its shareholders and property, were identical. The name of the corporation was The Ross Farm Petroleum Company, and this and the corporate character of the new company, constituted the only distinction between the two. The plaintiff, in order to recover back the money paid on the contract to purchase the stock, must establish that there was a breach by the defendant of his contract to transfer it. The law, on this being shown,

would raise an implied promise on his part to restore the consideration. But mere proof that the stock had not been transferred to the plaintiff is not sufficient to establish a breach.

To put the defendant in default, a demand of the stock by the plaintiff was necessary, or proof given that the defendant had put it out of his power to transfer it. It is conceded that no demand was made, but it is claimed that the transfer of the property of the associates to the corporation made it impossible for the defendant to perform his contract to give the plaintiff the interest which he contracted for, viz., an interest in the stock of the Ellenville Petroleum Company, and that this made a demand unnecessary. But we are of opinion that under the circumstances proved, the defendant's contract would have been performed by a transfer of stock in the corporation which succeeded to the property of the Ellenville company. The plaintiff is chargeable with knowledge that the purpose of the association was to organize a corporation on the basis of the property held by them, and that company was to be merged in the proposed corporation. His subsequent conduct shows that he understood that his interest under the contract was subject to this change. After the sale of the corporate property to Hermance, in 1866, he stated to him that he thought he had some stock and that he had a right to come in and have the benefit of the right of redemption from the sale, and was informed that his name did not appear as stockholder. Then for the first time he seems to have conceived the idea that he could hold the defendant liable for the money paid. The defendant paid the sum necessary to retain his interest in the property sold, and a transfer to the plaintiff by the defendant of an interest in the property held by Hermance in trust for the stockholders, equal to the interest which the defendant contracted to convey to him, would have satisfied any equitable claim of the plaintiff and have been a legal performance of the defendant's contract. There is no equity in favor of the plaintiff's claim. For all that appears defendant has been ready and willing to perform his contract. The plaintiff took the risks of the

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adventure, and the loss should be borne by him and not by the defendant. The defendant was not guilty of any fraud, and managed the interest of the plaintiff as he did his own, under an implied authority to do so.

The judgment should be reversed and a new trial granted.

All concur, except FOLGER and ANDREWS, JJ., not voting.

Judgment reversed.

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CLARENCE H. SMITH, Survivor, etc., Appellant, *v.* THOMAS RYAN, Respondent.

The delivery by a debtor to a creditor of a promissory note of a third person, as collateral security for, or as conditional payment, in part, of his debt, is equally an acknowledgment of liability for the whole debt, as would be an absolute payment, and is equally effectual to suspend the operation of the statute of limitations.

It is, however, only evidence of an acknowledgment and promise to pay at the time of the delivery of the note, not at the time of its maturity or when it is paid by the maker; the latter is not constituted agent of the debtor to renew the promise by payment, whether made at maturity or afterwards, and the statute begins to run from the time of the delivery.

Whipple v. *Blackington* (97 Mass., 476) distinguished.

(Argued May 29, 1876; decided June 6, 1876.)

APPEAL from order of the General Term of the Superior Court of the city of New York, reversing a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 7 J. & S., 489.)

This action was brought by plaintiff, as survivor of the firm of Isaac H. Smith & Son, to recover an alleged balance due that firm for goods sold. The defence was the statute of limitations. The referee found the following facts, among others

That, on the 10th day of April, 1868, the defendant was indebted to the said firm in the sum of $2,501.53 on account that, on or about the 14th day of April, 1868, the defendant indorsed and delivered to the said firm two notes for $500

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each, made by Betts & Gay, dated April 6, 1868, and payable in two and five months, respectively, with interest from their date; that, upon the receipt of the said notes from the defendant, they were entered in the books of plaintiff's firm by charging them to bills receivable and crediting them to the defendant's account; that, upon the maturity of said notes, respectively, the principal and interest thereon were paid to the plaintiff's firm, and the sums collected for principal thereon were carried to the credit of bills receivable upon their books; that the last item proved in the mutual account, between defendant and the plaintiff's firm, was the receipt in September, 1868, of the amount of the note of Betts & Gay for $500, and interest thereon for five months; that this action was commenced on the 5th day of June, 1874, within six years after the said last item of the said account between the defendant and plaintiff's firm.

As conclusion of law he found that plaintiff was entitled to judgment for the balance of the account, and judgment was entered accordingly.

Samuel Hand for the appellant. The delivery of the notes being on a precedent debt, and there being no evidence of an agreement to take them in absolute payment, the presumption is that they were received as collateral, to be credited as payments when paid. (*Noel* v. *Murray*, 13 N. Y., 168; *Gibson* v. *Toby*, 46 id., 640; *Vail* v. *Foster*, 4 id., 312; *Darnell* v. *Morehouse*, 45 id., 65, 71; *Whitbeck* v. *Van Epps*, 9 J. R., 408; *Breed* v. *Book*, 15 id., 241.) The notes were not a payment when delivered. (Edw. on Bills and Notes, 272; *Bk. of Utica* v. *Ballou*, 49 N. Y., 155; *Coml. Bk.* v. *Warren*, 15 id., 577; *Huntington* v. *Ballou*, 2 Lans., 120.) The date of the payment is to be reckoned from the payment of the notes. (*Whipple* v. *Blackington*, 97 Mass., 473; *Chapman* v. *Boyce*, 16 N. H., 237.)

Jas. B. Lockwood for the respondent. The indebtedness in suit was barred by the statute of limitations. (*Harver* v

Fairly, 53 N. Y., 442; *Turney* v. *Dodwell*, 24 E. L. and Eq., 92; *Hart* v. *Nash*, 2 Cr., M. & R., 337; *Hooper* v. *Stephens*, 4 A. & E., 71; *Pickett* v. *Leonard*, 34 N. Y., 175; *Miller* v. *Talcott*, 46 Barb., 167; *Wainman* v. *Kynman*, 1 Exch., 117; *Tippets* v. *Heane*, 1 C., M. & R., 252; *Butts* v. *Perkins*, 41 Barb., 509; *Read* v. *Hurd*, 7 Wend., 409.) The statute began to run from the time of the transfer of the notes to defendant. (*Govan* v. *Foster*, 3 B. & Ad., 507; *Griffith* v. *Owen*, 13 M. & W., 58; *James* v. *Williams*, id., 828; *Irving* v. *Veitch*, 3 id., 90.) The makers of the notes were not defendant's agents for any other purpose than to relieve him of his liability on the notes; they could not bind him on the antecedent debt. (*Creuse* v. *Defignoiux*, 10 Bosw., 122; *Pickett* v. *Leonard*, 34 N. Y., 175; *Bloodgood* v. *Bruen*, 8 id., 362; *Winchell* v. *Hicks*, 18 id., 558; *McLaren* v. *Martin*, 36 id., 88.)

ALLEN, J. The transfer by the defendant to the plaintiff of the note of Betts & Gay in April, 1868, was not a satisfaction of the debt owing by him to the plaintiff *pro tanto*, but was merely a conditional payment which could only result in an actual satisfaction upon the payment of the notes by the makers. (*Vail* v. *Foster*, 4 Com., 312; *Whitbeck* v. *Van Ness*, 11 Johns., 409; *Noel* v. *Murray*, 3 Kern., 167.) The delivery of the notes was, nevertheless, an acknowledgment at the time of an existing indebtedness, from which the law would imply a promise to pay the residue of the debt so as to suspend the operation of the statute of limitations and give an action for the debt thus admitted at any time within six years thereafter. The statute of limitations preserves the common law rule as to the effect of a partial payment either of the principal or interest, to continue in life or revive the entire debt which would otherwise be barred by the statute of limitations. (Code, § 110.) The delivery of a bill or note as collateral security or as a provisional or conditional payment in part of a debt is equally significant as an acknowledgment by the debtor of his liability for the whole demand, as would

be an absolute payment of a like amount, and is within the reason of the rule which makes such payment an acknowledgment of a liability from which a new promise to pay the residue is implied. The act is of the same character and equally unequivocal as a payment in fact. The reasons upon which the general principle referred to is founded are well stated in *Van Keuren* v. *Parmelee* (2 Com., 523) and *Harper* v. *Fairley* (53 N. Y., 442). The effect of the transaction is the same, whether the collateral security or conditional payment are made available and result in the payment of any part of the debt or not. The statute of limitations is answered from the time of the delivery of the collateral security. In *Turney* v. *Dodwell* (3 E. & B., 136) it was held, that the word "payment" in the proviso of the English statute of limitations, the same in substance as that found in our own statute, was used in the popular sense so as to include a giving and taking of a negotiable instrument on account of a debt as well as a giving and taking of it in satisfaction of the debt. The rule in that case was applied although it was assumed, that the payment in question was not absolute and in satisfaction so as to be a discharge, if the bill were dishonored. The delivery of a bill as a conditional payment, was held in its immediate operation to be an acknowledgment of the balance of the demand being due, and that such operation was not affected by the fact that a payment was liable to be defeated at a future time.

Had this action been brought within six years after the delivery of the notes to the plaintiff, the case would have been clearly within the proviso of the statute, as if an actual payment had been made at that day. The act, and the intention evidenced by it, is the same, whether the payment is absolute or conditional. The question then is, whether the payments to the plaintiff by the makers of the notes transferred, at their maturity, can be regarded as payment by the defendant on those days and thus operate as repeated acknowledgments of the residue of the debt, as it existed on the day of the delivery of the notes. It certainly does not necessarily follow,

that because an indebtedness existed in April, the same indebtedness continued and in the same form several months thereafter. Payments may have been made, and the relation of the parties, as debtor and creditor, have been essentially changed during the intervening period. The principle is recognized in all the cases, that a payment, which is to operate as an acknowledgment, must be made by the debtor or his authorized agent; that is, an agent having authority to make a new promise or to perform for the party the very act which is to be the evidence of a new promise. (*Harper* v. *Fairley*, *supra*; *First National Bank of Utica* v. *Ballou*, 2 Lans., 120; Aff., 49 N. Y., 155.) Betts & Gay, the makers of the notes, in paying the same discharged their own obligations, and did not in any respect represent or act in behalf of the defendant. The payments were made because of their obligation, not by reason of any request of the defendant. By the transfer of the notes to the plaintiff, they had become his debtor and their obligation was to him. The fact that the effect of the payment of their own debt was to satisfy to the same amount the debt of the defendant, did not vary the effect of the act or change the relation of the parties. There is no agency as between several joint debtors, or between principal and surety, or between an insolvent debtor and his assignees, which will make a payment by one, evidence of an acknowledgment of the debt of the others, so as to revive the demand. (*Van Keuren* v. *Parmelee*, *supra*; *Shoemaker* v. *Benedict*, 1 Kern., 176; *Winchell* v. *Hicks*, 18 N. Y., 558; *Pickett* v. *Leonard*, 34 id., 175). It would seem to follow, from the principle upon which these cases rest, that the debtors of the defendant in the payment of their debt to the plaintiff were not the agents of the defendant. In *Harper* v. *Fairley* this court held that the payment by the maker of a promissory note, transferred to the creditor under like circumstances as in this case, to be applied as a payment when collected (such payment being made long after the maturity of the note), was no evidence of authority from the defendant, who had transferred the note to his creditor, to make the payment when it was

made, and that no new promise upon his part could be implied from such payment. The effect of a payment of the note thus transferred, at maturity, was not considered, but I am unable to see why, if from the mere fact of the transfer of the note an agency is created in the maker, by which his payment of his own debt when due, without interference from the original debtor, is made the act of the latter, so as to be evidence of a new promise, such agency does not continue so long as the obligation to pay remains. The original debtor would certainly be entitled to the benefit of a payment made at any time, and the authority would not cease until revoked by a re-transfer of the note to the original debtor. The transfer of a note yet to become due on account of a debt is not in effect a stipulation or admission that the residue of the indebtedness shall remain until the maturity of such note. The difficulty in the plaintiff's case is to give a new character to the simple act of paying one's own debt, by making it a payment by a third person and to change the relation of debtor and creditor into that of principal and agent. The same question was before the Court of King's Bench in *Gowan* v. *Forster* (3 B. & Ad., 507), and it was held that the drawing of a bill by the debtor upon his consignees on account of a sum due to the drawees was only evidence of a promise to pay the residue of the debt at the time when it was drawn, and not when it was paid, and therefore did not take the case out of the statute. It was evidence of a promise at the time when the bill was given, and not a subsequent one. LITTLEDALE, J., says: "The bill might be an authority to the agent to pay at another time, but no promise by the principal at such a time." The payment by Betts & Gay was no evidence that the defendant intended to recognize any debt as then subsisting against him and which he was willing to pay. *Read* v. *Hurd* (7 Wend., 408), *Haven* v. *Hathaway* (20 Me., 345), and *Porter* v. *Blood* (5 Pick., 54) were decided substantially on the same ground as *Harper* v. *Fairley* (*supra*). *Whipple* v. *Blackington* (97 Mass., 476) was decided chiefly upon the statutes of Massachusetts, essentially different from the English statute

Statement of case.

of limitations or the statute of this State, and upon the effect of a payment upon a collateral security collected by the debtor as the agent of the creditor and paid to him. The case is clearly distinguishable in its facts from the present, aside from the construction and effect given to the statutes under which the question arose. Betts & Gay were not the agents of the plaintiff in paying their debt, and no implication arises from such payment of an acknowledgment by the defendant of the existence of the debt for which this action is brought and no promise by the defendant can be implied therefrom. We are not called upon to decide what would be the effect of payment by a debtor of one indebted, made at the special request of the latter. Circumstances might be such that the payment might be deemed the act of the original debtor. But such is not the case where a bill or note is transferred on account of a debt, either as collateral to it or a conditional payment of it. The transfer of an obligation does not constitute the obligor the agent of the transferrer.

The order must be affirmed and judgment absolute for defendant.

All concur.

Judgment affirmed.

IN THE MATTER OF THE PETITION OF MARY A. WHITTLESEY, Respondent, *v.* ANTOINETTE E. HOGUET, Executrix, etc., Appellant.

An order of General Term affirming an order of Special Term reviving against his executors a special proceeding instituted against a discharged trustee, and pending at his death, is not appealable to this court; it is not "a final order affecting a substantial right made in a special proceeding" within section 11 of the Code (sub. 3), but an intermediate order relating to the procedure.

(Argued May 30, 1876; decided June 6, 1876.)

Opinion of the Court, per ANDREWS, J.

APPEAL from order of the General Term of the Supreme Court in the first judicial department affirming an order of Special Term.

The nature of the Special Term order and the facts are sufficiently stated in the opinion.

Joshua M. Van Cott for the appellant.

Samuel Hand for the respondent.

ANDREWS, J. This order is not appealable. It is an order of the General Term affirming an order of the Special Term reviving a special proceeding instituted against a discharged trustee, and pending, at his death, against his executors. In 1858 the court, upon the petition of the trustee, made an order discharging him from the trust, and relieving his sureties, and appointing a new trustee, it being made to appear that he had accounted for and paid over the trust fund in his hands to his successor in the trust.

In 1872 the *cestui que trust* applied to the court, by petition, for an order vacating the order discharging the trustee and his sureties, made in 1858, and for other relief, upon allegations that that order was procured by imposition upon the court. The court, upon the presentation of the petition, made an order referring it to a referee to take proof of the matters stated in the petition, and report the same, with his opinion thereon, to the court. The parties appeared and proceeded with the reference, but, pending the proceedings, the trustee died, and the Special Term, upon the application of the *cestui que trust*, made the order reviving the proceedings against the executors, from which an appeal was taken to the General Term, where the order was affirmed, and it is now brought here by appeal.

The order reviving the proceedings was not a final order affecting a substantial right made in a special proceeding within the third subdivision of section 11 of the Code. The object of the order was to remove an obstruction, occasioned

by the death of one of the parties, to further proceeding in the application to vacate the order discharging the trustee and his sureties, and which, until removed, prevented a final order being made upon the application. It was an intermediate order relating to the procedure. It was not a final order in the proceeding. It left the question whether the order should be vacated undetermined.

The right of appeal to this court from the order in question, if it exists, is given by the third subdivision of section 11 of the Code referred to, and this does not confer it. The fourth subdivision relates to orders in actions, and not in special proceedings.

The appeal must, therefore, be dismissed, without passing upon the question of the power of the court to make an order reviving and continuing the proceeding to vacate the order discharging the trustees, against his executors.

All concur.

Appeal dismissed.

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WILLIAM H. PLATT et al., Respondents, v. GEORGE W. PLATT, Appellant.

Where, in an action to set aside conveyances of real estate as obtained by fraud, an interlocutory judgment has been rendered determining the title to be in plaintiff, subject to certain liens of defendant, and directing an accounting, and where, by consent, a receiver has been appointed to receive the rents during the accounting, it is within the discretion of the court to order the receiver to pay over the rents collected to the plaintiff upon such terms as it may deem proper.

The exercise of this discretion may be reviewed by the General Term, but not by this court, and the order of the General Term thereon is not appealable.

(Argued May 30, 1876; decided June 6, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming an order of

Special Term, directing the Union Trust Company, receiver herein, to pay over to plaintiffs an accumulation of rents in its custody.

This action was brought, among other things, to set aside certain conveyances of real estate made by plaintiffs' testator to defendant, on the ground of fraud.

Several of the parcels of land conveyed had been bid off by defendant upon foreclosure sale. The Special Term sustained the allegations of fraud and directed a reconveyance of the lands, holding, however, that defendant had an equitable lien for the amount paid by him on the purchases at foreclosure sales, and also directed an accounting. Defendant moved for a new trial on a case; the General Term denied the motion and defendant appealed to the Court of Appeals, where the interlocutory judgment was affirmed. (58 N. Y., 646.) During the accounting the Union Trust Company was, by consent of both parties, appointed receiver of the rents of the property in question. The order appealed from recited that plaintiffs had filed a sufficient bond, approved by the court, conditioned that plaintiffs would pay the moneys received by them from the receiver into court again if the court so ordered, and ordered that the receiver pay to plaintiffs' attorney the amount in its hands, and such as should be thereafter collected, less taxes, insurance and receiver's fees.

S. P. Nash for the appellant. There was no authority for making the order appealed from. (*Nedby* v. *Nedby*, 4 My. & Cr., 367; *Cooke* v. *Barker*, Hopk., 117; *Coursen* v. *Hamlin*, 2 Duer, 513; 2 Dan. Ch. Pr., 1777 [Am. ed. of 1871]; *Dusenberry* v. *Woodward*, 1 Abb. Pr., 443, 454.) The order appealed from was not discretionary. (*Carrington* v. *Fla. R. R. Co.*, 52 N. Y., 583; *Brinkley* v. *Brinkley*, 47 id., 41.)

Wm. R. Martin for the respondents. The order appealed from was discretionary and not appealable. (*People* v. *N. Y. C. R. R. Co.*, 29 N. Y., 422; 59 id., 315; *Howell* v.

Mills, 53 id., 322; *Bolles* v. *Duff*, 43 id., 469; *Cushman* v. *Brundrett*, 50 id., 297; *Colman* v. *Dixon*, id., 572; *Livermore* v. *Bainbridge*, 56 id., 72; *Miller* v. *Tyler*, 58 id., 477; *Crane* v. *Styer*, id., 625; *Pfohl* v. *Sampson*, 59 id., 174; *Holyoke* v. *Adams*, id., 233; *Brown* v. *Keeney, etc., Assn.*, id., 242.)

Per Curiam. The rents which were disposed of by the order from which this appeal was taken were paid into court by consent of the defendant, and were subject to its control and direction. It rested, therefore, in the power of the court to determine what disposition should be made of them pending the accounting and while the action remained undetermined. It had the power to make the plaintiffs receivers of the fund instead of the Union Trust Company, which was appointed originally, and in the exercise of its discretion to award that it be paid over to the party to whom the judgment gave a right to the same, subject to the equitable rights of the defendant, upon such terms as might be proper under the circumstances presented. Even if the order involved a substantial right it was, notwithstanding, discretionary. And being discretionary, it was not appealable within the provisions of the Code. While the General Term can review discretionary orders affecting a substantial right, this court has no such authority. (59 N. Y., 315.)

As the order rested in the discretion of the court and was not appealable, the appeal must be dismissed, with costs.

All concur.

Appeal dismissed.

Statement of case.

ALBERT COLE, Respondent, *v.* ROBERT MALCOLM, Impleaded, etc., Appellant.

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The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his own rights or to save his own property.

C., being indebted to plaintiff, conveyed certain lands through a third person, without consideration, to his wife, who died intestate. Plaintiff thereafter recovered judgment against C., and, after return of execution thereon unsatisfied, commenced an action against C. and the heirs of his wife to set aside the conveyance as fraudulent against creditors, and obtained a judgment setting it aside as to plaintiff, declaring his judgment a valid lien thereon, and appointing a receiver to sell, etc. The receiver advertised the land for sale. Defendant M., one of the heirs, and who had succeeded by purchase to the rights of nearly all the others, tendered the amount due on plaintiff's judgments, and demanded an assignment thereof, which was refused. M. thereupon made a motion to compel an assignment upon payment, and that he be subrogated to the rights of the owner of the judgments, which was denied. *Held*, error; that the title of the heirs was good as against C., and upon payment of the judgments, which were his debts, to save their lands, they were entitled to subrogation as against him.

Also, *held* (ALLEN and FOLGER, JJ., dissenting), that the point that it was discretionary with the Supreme Court whether to entertain the motion or to turn M. over to an action not having been taken by respondent, and the motion having been disposed of below upon the merits, and not upon the ground that an action should have been commenced, the point would not be considered here.

(Argued May 30, 1876; decided June 6, 1876.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department affirming an order denying a motion on the part of defendant Malcolm to compel an assignment to him, by Hiram K. Miller, plaintiff's assignee, of certain judgments herein.

The facts are sufficiently stated in the opinion.

John R. Dos Passos for the appellant. The conveyance from Crawford to his wife, while fraudulent as to creditors, was perfectly good *inter partes*. (*Jackson* v. *Guernsey*, 16

J. R., 189; *Osborn* v. *Moser*, id., 187; *Hall* v. *Stryker*, 9 Abb. Pr., 342; 29 Barb., 105; Bump on Fraudulent Conveyances, 442, 450, 451, notes 571, *et seq.*; *Feagan* v. *Cureton*, 19 Geo., 404.) The doctrine of subrogation is applicable to this case. (Bouv. Dict., title "Subrogation," Bin. R., 382; *Cottrell's Appeal*, 23 Penn., 295; Civil Code of Louisiana, arts. 2155–2158; *Sec. Ins. Co.* v. *Shultz*, 7 Alb. L. J., 109; *Johnson* v. *Zink*, 51 N. Y., 333.)

Hamilton Odell for the respondent. Defendant's claim to be subrogated has nothing to support it. (*Sanford* v. *McLean*, 3 Paige, 122; *Wilkes* v. *Harper*, 1 N. Y., 586; *Ellsworth* v. *Lockwood*, 42 id., 89; *Patterson* v. *Birdsall*, 6 Hun, 637.)

EARL, J. Prior to December, 1869, John Crawford was indebted to the plaintiff in the sum of $4,000 and upwards, and at the same time he owned certain land in this State. He conveyed the land, through a third party, to his wife, without any consideration, for the purpose of vesting the title thereto in her. In 1870 she died intestate, leaving no children, and the land passed to her heirs, of whom Robert Malcolm, the appellant, was one; and he has since, by purchase, succeeded to the rights of nearly all the others. After her death the plaintiff commenced an action against Crawford, and recovered judgment for the amount of the debt due him, and issued execution thereon and had the same returned unsatisfied. He then commenced an action against Crawford and the heirs of his wife to set aside the conveyance of the land as a fraud upon his creditors, and obtained a judgment setting aside the conveyance as to the plaintiff, declaring that plaintiff's judgment was a valid lien and charge upon the land, and appointing a receiver to sell the same for the purpose of paying plaintiff's judgment and the costs of the action. That judgment was affirmed at General Term, and, upon further appeal, by the Commission of Appeals. Some time after the final affirmance, the receiver advertised the land for sale in pursuance of the judgment. Before the day

of sale, Malcolm tendered to Hiram K. Miller, to whom plaintiff had assigned his judgments, the amount due upon them, and demanded an assignment thereof to him. Miller refused to make the assignment, and then Malcolm obtained an order staying the sale, and made a motion to compel an assignment of the judgments to him, upon payment thereof, and that he be subrogated to the rights of Miller in the judgments. The motion was denied, and the order, having been affirmed at General Term, is now before us for consideration upon Malcolm's further appeal.

Malcolm claims that the equitable principle of subrogation applies to this case, and that he has the right, upon payment of the judgments, to have them assigned to him that he may enforce them against Crawford, the judgment debtor; and whether or not this claim is well founded is the sole question for our consideration.

Crawford's conveyance to his wife was valid and effectual as between them. It divested him of the title to the land, and vested it in her. As against him her title to the land was just as good as if she had paid full value. He had no claim as against her that the land should in any way be subjected to the payment of his debts. She was under no obligation to pay his debts, and as to him she did not take the land subject to his debts. If he had paid his debt to the plaintiff, or if he had had sufficient other tangible property to satisfy that debt, this land could not have been in any form charged with its payment. It was in this condition that the land passed to her heirs.

The conveyance was set aside, not for any fraud on her part, and not for any actual fraud on his part, but simply because it deprived his creditor of the means of collecting his debt. That debt has now been charged upon this land, which, as against him, has become absolutely vested in his wife's heirs; and their land, land but for his creditors absolutely theirs, is liable to be sold to pay the debt. Under such circumstances, upon the payment of the judgments by Malcolm, which he is obliged to pay to save his land from sale,

the principles of justice and equity require that he should be subrogated to all the rights and securities of the judgment creditor. The equitable doctrine of subrogation has many illustrations in reported cases. (*Sandford* v. *McLean*, 3 Paige, 117; *Atlantic Ins. Co.* v. *Storrow*, 5 Paige, 285; *Slade* v. *Van Vechten*, 11 Paige, 21; *Graham* v. *Dickinson*, 3 Barb. Ch., 169; *Ellsworth* v. *Lockwood*, 42 N. Y., 89; *Patterson* v. *Birdsall*, 6 Hun., 632, affirmed in Court of Appeals; *Liddendale's Exrs.* v. *Robinson's Admr.*, 2 Brockenbrough, 159; *Cottrell's Appeal*, 23 Penn., 294; Bouvier's Dict., "Subrogation.") It is generally and most frequently applied in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is only secondarily liable for the debt; but it is also applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property. In *Cottrell's Appeal*, WOODWARD, J., said: "Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between parties. Whenever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditors possessed against the debtor." In *Liddendale's Exrs.* v. *Robinson's Admr.*, Ch. J. MARSHALL said: "When a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged."

The Supreme Court seems to have denied the subrogation in this case on the ground that Mrs. Crawford and her heirs took the land subject to the claims of Crawford's creditors, and that therefore the heirs will have, after the payment of the judgment, all that was actually conveyed. This is not the correct view. It is substantially correct, however, when the relations between them and the creditor are alone con-

sidered. But subrogation against the creditor is not asked. He gets all he is entitled to when his judgments are paid, and he will then have no further interest in or claim upon the land. But the title of the heirs being good as against Crawford, when they pay the judgments against him to save their land they pay his debt, and they should have subrogation against him.

The point that it was discretionary with the Supreme Court to entertain this motion or turn Malcolm over to an action to obtain subrogation has never been taken by the respondent, and the motion was disposed of in the Supreme Court upon its merits, and not upon the ground that an action should have been commenced. The point should not, therefore, be considered now.

Order of Special Term and of the General Term reversed, and motion granted.

All concur except ALLEN and FOLGER, JJ., who unite in the following memorandum.

ALLEN and FOLGER, JJ., were for dismissing the appeal upon the ground that it was discretionary with the court below whether to grant the relief to which the respondent claimed to be entitled upon summary application, or to put him to his action. (*Shuman* v. *Strauss*, 52 N. Y., 404.) If the motion was denied on the ground that the court was not authorized to exercise its discretion, the *onus* was upon the appellant to show it. (*Cushman* v. *Brundrett*, 50 N. Y., 296.) The non-appealability of the order appearing upon the record, a waiver of the objection by the respondent, or an omission to take it, does not authorize the court to entertain the appeal. The court has repeatedly, upon its own suggestion, dismissed appeals from orders for the reason that they were discretionary, and, therefore, not appealable.

Orders reversed and motion granted.

Statement of case.

LUCINDA RUTHERFORD, Respondent, v. SAMUEL A. HOLMES, Appellant.

A court of a justice of the peace has no power to adjudge a person in contempt and to punish him therefor, save in the cases prescribed by statute. (ANDREWS and MILLER, JJ., dissenting.)

In order to give such court jurisdiction to punish a witness for contempt for refusing to answer a proper and pertinent question, there must be an oath of the party, at whose instance he attended, of the materiality of the testimony (2 R. S., 274, § 279), and a justice is liable in an action for false imprisonment, at the suit of one imprisoned under and in pursuance of his warrant of commitment for such a contempt, where it does not appear in the warrant or by the evidence that such an oath was made. (ANDREWS and MILLER., JJ., dissenting.)

It is immaterial that the witness was a party sworn in his own behalf that the question he refused to answer was asked upon cross-examination, and that it was therefore impossible to meet the requirements of the statute; this does not authorize a disregard of it. (ANDREWS and MILLER, JJ., dissenting.)

It seems that in case of such refusal to answer, the remedy of the opposite party is to move to strike out the direct-examination.

(Argued May 31, 1876; decided June 13, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, setting aside a nonsuit and granting a new trial. (Reported below, 5 Hun, 31.)

This was an action for false imprisonment.

The defence was that defendant was a justice of the peace of the town of Colchester, Delaware county, and that he caused plaintiff to be imprisoned for contempt in refusing to answer a question put to her, as a witness, in an action on trial before him, as such justice.

Plaintiff's evidence tended to show that plaintiff was defendant in a suit pending before defendant, as justice, and was sworn as a witness in her own behalf, and upon cross-examination was asked a question which she refused to answer. Defendant thereupon issued his warrant of commitment, reciting the facts, alleging that the question was pertinent and

proper, and directing that she be taken to and confined in jail until she submits to answer, etc. Under and by virtue of the warrant she was taken to jail and confined until discharged by order of defendant. At the close of plaintiff's evidence defendant's counsel moved for a nonsuit, which was granted. Exceptions were ordered to be heard at first instance at General Term.

Wm. Gleason for the appellant. The justice had authority to commit the witness for refusing to answer. (Ventris, 1; 1 Bays' R., 1; 3 Cai. R., 170; 10 J. R., 393; 1 Stra., 420; 2 R. S., 226, § 1; 426, § 1 [5th ed.]; *Robbins* v. *Gorham*, 26 Barb., 586, 593; *In re Watson*, 5 Lans., 470; *People* v. *Fancher*, 2 Hun, 226, 232, 233; 1 Black. Com., 59, 60; 1 Kent's Com., 462–464; 6 Hill, 630; 13 N. Y., 81.) All objections which might have been made were waived by not being made at the time. (24 Wend., 339; 5 Hill, 468; 6 id., 47; 3 N. Y., 511; 2 Den., 169; 7 How., 42; 12 Barb., 9–19; 4 Sandf., 409–412; 2 Wend., 485; 23 Barb., 444; 42 id., 39; 5 Lans., 318.) The act complained of was a judicial determination in a proceeding in which the justice had jurisdiction, and he was not liable for his judgment, however erroneous or wrongful it may have been. (*Weaver* v. *Devendorf*, 3 Den., 120; 1 Cow. Tr., 39 [3d ed.]; T. & C. R., §§ 17, 18, 1247; 3 Den., 117–120; 1 Wait L. and Pr., 737; 2 id., 645, 647; 5 J. R., 282; 9 id., 395; 17 id., 145; 8 Cow., 178; 3 id., 206; 37 N. Y., 513; 35 id., 238; 43 id., 186; 4 Abb. [N. S.], 469; 24 Barb., 419; 6 id., 621; 6 Hill, 44; 7 Wend., 200; 24 N. Y., 75; 7 Abb. Pr., 96; 29 Barb., 626; *Moor* v. *Ames*, 3 Cai., 170; *Mather* v. *Hood*, 8 J. R., 45, 47, 51, 70, 72; *Smith* v. *Worden*, 4 Hun, 787; *Field* v. *Parker*, id., 343.)

L. L. Bundy for the respondent. Defendant had no authority to issue the commitment until the statutory requirements were complied with. (2 Stat. at Large, 282, § 279; 281, § 274; *Way* v. *Carey*, 1 Cai., 191; *Janes* v. *Reed*, 1 J. Cas., 20; *Wells* v. *Newkirk*, id., 228; *Bigelow* v. *Stevens*, 19 J.

Opinion of the Court, per FOLGER, J.

R., 39; *People* v. *Koller*, 7 Hill, 39, 41; *Horton* v. *Auchmoody*, 7 Wend., 200; *Everteon* v. *Sutton*, 5 id., 281; *Yates* v. *Lansing*, 5 J. R., 282; *Blythe* v. *Tompkins*, 2 Abb., 468; *Clark* v. *Holdridge*, 58 Barb., 61, 71; *Comfort* v. *Fulton*, 39 id., 56; *Percival* v. *Jones*, 2 J. Cas., 49; *Bigelow* v. *Stearns*, 10 J. R., 39; *Sprague* v. *Eccleston*, 1 Lans., 74; *Barnes* v. *Harris*, 4 N. Y., 375; *People* v. *Webster*, 14 How., 246, 247; *Gold* v. *Bissell*, 1 Wend., 213; *Hall* v. *Munger*, 5 Lans., 103.) Defendant was bound to show affirmatively that he had jurisdiction. (*Hawley* v. *Butler*, 48 Barb., 101; *Comfort* v. *Fulton*, 13 Abb., 276; *Brackett* v. *Eastman*, 17 Wend., 32; *Wood* v. *Terry*, 4 Lans., 84; Phil. Ev. [Edw. ed.], C. and H. Notes, 604, 605, 813, 814.) Plaintiff had a right to show that she did not in fact refuse to answer the questions put. (*Scott* v. *Ely*, 4 Wend., 555; *People* v. *Cassels*, 5 Hill, 165; *Starbuck* v. *Murray*, 5 Wend., 158; *Davis* v. *Packard*, 6 id., 332; *Bloomi* v. *Burdick*, 1 Hill, 139; *Hurd* v. *Shipman*, 6 Barb., 623, 624; *Chemung Canal Co.* v. *Judson*, 8 N. Y., 259; *Dobson* v. *Pearce*, 12 id., 164; *Hatcher* v. *Rochelean*, 18 id., 92; *Bolton* v. *Jack*, 6 Robt., 166, 198–200.)

FOLGER, J. The point made by the plaintiff, that the court erred at Circuit, in not holding that the defendant, to justify his act, was bound to show in defence and affirmatively, that he was a justice of the peace *de jure*, is not well taken. The opening of the plaintiff's counsel, and the testimony of the plaintiff, show that it was substantially conceded, that he had the title to the office and was in the exercise of the powers and jurisdiction of it.

The important question in the case is, whether the defendant, upon the facts now shown, had the power to commit the plaintiff for contempt. That he had jurisdiction of the person of the plaintiff, and of the subject-matter then pending, did not give him judicial authority to adjudge her guilty of a contempt, and to imprison her therefor. To have that authority, there must have arisen before him, facts which gave him power to consider of the question whether there

had been a contempt committed by her. When facts arose which gave him that power, he had a right to adjudicate upon them, and is not liable to an action, though he may have held erroneously as matter of law. So that the inquiry is, was there a state of facts existing, upon which could be based a power to consider and determine whether the defendant was in contempt?

It is not contended by the learned counsel for the respondent, but that a justice of the peace had that power at common law, upon a state of facts such as the defendant claims existed. Have the provisions of the statutes taken it away, or so restricted that power, as that it may be exercised only in the cases prescribed by written law? Clearly, if this is conceded to be a contempt known to the law as a criminal contempt, or one to be treated as a criminal contempt, the statutes are definite in taking away the power to deal with it as such. 2 Revised Statutes, page 273, section 274, specifies the acts which a justice of the peace may punish as for a criminal contempt. The conduct imputed to the plaintiff in this case is not within that classification. And it is of some import to note, that in the corresponding provision relating to courts of record, the statutes have given to them the power to punish, as for a criminal contempt, the refusal of any person, when sworn as a witness, to answer any legal and proper interrogatory. (2 R. S., p. 278, § 10, subd. 5.) This is indicative of a legislative conception that such refusal is properly punishable as for a criminal contempt, and it is, also, indicative of the legislative purpose not to confer the power so to do upon a justice of the peace, or to leave it with him. It is still more indicative of that purpose, that the legislature has especially declared in what condition of things a justice of the peace may punish, as for contempt, a refusal to answer of a person who is a witness, and has prescribed the manner in which the punishment may be inflicted, and the kind and extent of it. It is also significant, that the legislature, so far as it has in general terms enacted for proceedings as for contempts to enforce civil remedies, and to protect the

rights of parties in civil action, has confined its action to courts of records (2 R. S., p. 534, § 1, *et seq.*), and has here, again, provided for the punishment of persons, who, as witnesses, refuse to answer. (Id., subd. 5.) It is to be noted, too, that in the cases thus provided for which may usually arise in the court of a justice of the peace, there are specific provisions of statute relating to that court alone, pointing out the facts upon which the contempt may be adjudged, the mode of inflicting it, and the kind and extent of it. (2 R. S., p. 274, §§ 279, 280; id., p. 241, § 83, *et seq.*; id., p. 245, § 112.) In addition to the indication from these enactments, is that furnished by 2 Revised Statutes (p. 225, § 1), in which necessary general powers are given to that court only where no special provision is likewise made by law. Besides that, it was the expressed purpose of the revisers, and hence of the legislature, to define the power of a justice of the peace, to fine and imprison for contempts, and to regulate the exercise of it. (5 Edmond's Statutes at Large, pp. 425, 426; Reviser's notes to § 274, and §§ 10 to 15.) We incline to the opinion that a court of a justice of the peace, has no power to adjudge a person in contempt, and to punish him therefor, save in a case, stated in the statute law.

But it is clear that the defendant did not assume to have authority save under the statute above cited. (2 R. S., 274, § 279.) The warrant of commitment is, in its terms, based thereupon. It states that the plaintiff was sworn as a witness, was asked a proper and pertinent question, and refused to answer to it. It commanded the close confinement of the plaintiff until she should submit to answer the question or be discharged according to law. As that section prescribes as a prerequisite that there shall be an oath of the materiality of the testimony, and as it does not appear either from the warrant, or the evidence in this case, that such an oath was made, the defendant had no judicial authority to adjudge the plaintiff guilty of a contempt. The imprisonment ordered by him was unlawful, and he is liable to her in damages for his act in ordering it.

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It is claimed that this requirement of the statute does not apply to a refusal to answer a pertinent and proper question, but only to a refusal to be sworn; and, though the grammatical construction of the sentence demands that it be applied to one as well as to the other, inasmuch as both are its antecedents, yet that there may be, in interpretation, a transposition of the parts of the sentence so that the latter shall alone be an antecedent. This would be doing violence to the formation of the sentence as it was left by the law-maker. It would be doing violence to the sense as well. It is no more needful, in abstract view, to found a proceeding to punish for contempt on a refusal to be sworn, that all the testimony sought from the witness should be material and be made so to appear by affidavit, than to found such proceeding on a refusal to answer a single question. The object of giving the power to punish is to prevent a hindrance of a civil remedy. And unless the refusal to answer a single question works such hindrance, the reason for giving the power does not exist. So in that case, as well as in that of a refusal to be sworn and testify at all, it is of importance that such ill effect be the result, and be made so to appear.

The act of refusing to answer, and of refusing to be sworn, are alike in their nature and effect, and the legislature has treated them as alike. They each affect the same party, viz.: he for whom the witness is called, or who puts the question.

That the making of the oath was impossible in this case, does not drive us to the construction contended for. It might happen that a casual bystander in court would refuse to be sworn. He would not, in the language of the section, be a witness attending before the justice at the instance of a party. It would then be impossible for the oath to be made. Yet we may not for that reason alter the statute.

It is true that, in this case, the oath could not be made, as the respondent, the witness, was the defendant in the Justice's Court, was put upon the stand in her own behalf, and was under cross-examination by her opponent, the plaintiff there,

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when she refused, as is alleged, to answer a pertinent and proper question, and it was impossible for the plaintiff to meet the requirement of the statute. But this does not authorize a disregard of the plain demand of the law. The right of a party to be a witness in his own behalf has been given by law since the statutes concerning contempts were adopted, and it is not surprising that the earlier statutes do not cover all the cases arising under the later.

It is not for us to point out the mode in which the plaintiff in the action on trial before the defendant could have protected his rights. In a court of record, if the cross-examination of a witness fails to be complete for any cause not assented to by the party cross-examining, the direct-examination will, on motion, be stricken out. We see no reason why the same rule will not hold in the court of a justice of the peace.

This view of the case is conclusive of this appeal, and there is no need of considering several questions raised by the plaintiff.

The order of General Term should be affirmed, and there should be judgment absolute for the respondent on the appellant's stipulation.

All concur, except ANDREWS and MILLER, JJ., dissenting.

Judgment affirmed.

BENJAMIN F. YOUNG, Administrator, etc., Respondent, *v.* JOHN HEERMANS et al., Appellants.

A transfer by a debtor of all his property, real and personal, without consideration and in trust for him and for his benefit during his life, and after his death for the payment of his debts, etc., is, *per se*, conclusive evidence of fraud as to existing creditors; no extrinsic circumstances or evidence *aliunde* is necessary to establish a fraudulent intent. It is void, therefore, as against such creditors both as to the real and the personal estate.

The innocence of any fraudulent intent, upon the part of the transferee, will not protect his title.

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Where, at the time of such a transfer, the transferrer has in his hands, as agent for another, securities belonging to his principal for which he is liable to account, although no demand has been made upon him to transfer and surrender the securities, yet there is a fiduciary and pecuniary obligation, and a contingent liability which makes the principal a creditor, within the meaning of the statute, against fraudulent conveyances. (2 R. S., 135, § 1; 137, § 1.)

It is not necessary for the principal, in order to impeach the transfer for fraud, to show that his agent actually intended at the time a misappropriation or conversion of the securities.

After the commencement of an action by a principal to set aside such a conveyance made by his agent, the latter died; his personal representatives were substituted as defendants but his heirs at law were not brought in. *Held*, that while, so far as the real estate was concerned, the proper parties were not before the court to authorize a determination of the question as to whether a legal estate vested in the grantee upon valid trusts, as against the heirs; yet that plaintiff was entitled to judgment, declaring the conveyance void and his judgment a lien upon the real property as against the grantee, as if no conveyance had been made, with leave to proceed by execution against the lands according to the course and practice of the court.

(Argued June 1, 1876; decided June 13, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, modifying a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as judgment creditor, to vacate and set aside certain conveyances or deeds in trust, made by John Fellows to defendant John Heermans, as fraudulent and void against creditors.

Fellows, who was one of the original parties defendant, died after the commencement of the action and his personal representatives were substituted in his stead.

The facts as found by the referee are, in substance, as follows: Said Joseph Fellows, up to and for many years prior to May, 1871, was agent of Richard T. P. Pulteney, plaintiff's intestate, who was a non-resident of the United States, for the sale of real estate, collection of debts, etc. That prior to October, 1868, said Fellows collected a large amount of

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money as such agent, and invested the same in railroad stocks, government bonds and county bonds, holding said stocks in his own name as trustee for Pulteney. That on October 3, 1868, Fellows executed and delivered to defendant Heermans an instrument in writing, whereby, for the expressed consideration of one dollar, he granted and conveyed to said Heermans all his real and personal estate, in trust, to sell the lands, collect the debts, and, after paying the expenses of the trust, to pay over to Fellows, or to appropriate to his use, the residue of all moneys received; after the death of said Fellows, and the payment of all his just debts, to distribute the residue as directed in an instrument to be thereafter executed supplementary thereto. On the 10th of October, 1868, Fellows executed another instrument to take the place of the first, similar to it, with the addition of a power in the trustee to rent the lands until sold. On the 15th of October, 1868, Fellows executed and delivered to Heermans the supplementary instrument referred to, directing as to the distribution of the residue of the real and personal property after payment of debts. Heermans, upon the execution of said instrument, took possession of Fellows' real and personal estate. In May, 1871, Pulteney demanded the securities so held by Fellows, and upon his refusal to deliver up the same, commenced an action against him to recover the same or their value, and obtained a judgment for $142,209.43, upon which execution was duly issued and returned unsatisfied. In June, 1871, Fellows executed to Heermans another instrument conveying all his real estate and personal estate acquired subsequent to the prior conveyances; also his right and interest in the avails in trust, to rent the real estate, collect debts and sell the real estate after the death of the grantor; to pay over to the latter, instead of as provided in the former instrument, $2,000 during his life, and after his death, and after payment of debts, to distribute the residue as specified. The court found that the said instruments were executed without consideration, and were made by Fellows with intent to hinder, delay and defraud his creditors, and, as conclusions of law, that plaintiff

was entitled to have his judgment satisfied out of the property so transferred, and that the equitable lien thereon acquired by the commencement of the action survived the death of Fellows. Judgment was perfected decreeing that Heermans pay the amount of plaintiff's judgment with interest in three years, in semi-annual payments, and in case of default, that a receiver be appointed of all the property which came to the hands of Heermans. Defendant Heermans appealed. The General Term modified the judgment by decreeing that plaintiff's judgment should not be a lien or charge upon the real estate, as the same descended to the heirs of Fellows, and as they were not made parties, and affirming the judgment as thus modified. Both parties appealed to this court.

William Rumsey for the plaintiff. The judgment against Fellows was *prima facie* evidence against Heermans to establish the indebtedness of Fellows to plaintiff. (*Hindes* v. *Longworth*, 11 Wheat., 199, 209; Freeman on Judgments, § 418; C. & H. Notes, 981, 982, note 693 [4th Am. ed.]; *Voght* v. *Ticknor*, 48 N. H., 242; *Church* v. *Chapin*, 35 Vt., 223, 231; Pomeroy's Remedies and Rights, §§ 618–621; *Baker* v. *Drake*, 53 N. Y., 211, 214; Gould's Pldgs., chap. 6, §§ 29, 30.) The deeds to Heermans being voluntary and without consideration are fraudulent and void. (*Rathbun* v. *Platner*, 18 Barb., 272–274; 46 id., 157; *Griffin* v. *Marquardt*, 17 N. Y., 28; *Dart* v. *Farmers' Bk.*, 27 Barb., 337, 345; *Newman* v. *Cordell*, 43 id., 448; *Babcock* v. *Eckler*, 24 N. Y., 632; *Seymour* v. *Davis*, 14 id., 569; *Newman* v. *Cordell*, 43 Barb., 448, 456; *Sexton* v. *Wheaton*, 8 Wheat., 229, 243; *Reade* v. *Livingston*, 3 J. Ch., 492; *Hawley* v. *Sackett*, 6 N. Y. S. C., 322; *Holmes* v. *Clark*, 48 Barb., 237; *Freeman* v. *Hope*, L. R., 9 Eq., 205; 5 Ch. App., 538; *Cropley* v. *Elworthy*, L. R., 12 Eq., 158; *Mackay* v. *Douglass*, L. R., 14 id., 106; *Carpenter* v. *Roe*, 10 N. Y., 227; *Fox* v. *Moyer*, 54 id., 125, 131; *Newman* v. *Cordell*, 43 Barb., 457; *Bennett* v. *McGuire*, 58 id., 625, 636; *Nicholson* v. *Leavitt*, 6 N. Y., 510; *Burdick* v. *Post*, 12 Barb., 168; 6 N. Y., 522; *Dun-*

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ham v. *Waterman*, 17 id., 9, 17, 18.) The deeds were void, because the trusts provided for in them were primarily for Mr. Fellows' use. (2 Edm. Stat., 140, § 1; 2 R. S., 135, § 1; *Curtiss* v. *Leavitt*, 15 N. Y., 9, 176, 206, 295; *Goodrich* v. *Downs*, 6 Hill, 438, 442; *Mackie* v. *Cairns*, Hopk., 373; *McLean* v. *Butler*, 19 Barb., 450; *Mittnacht* v. *Kelly*, 5 Abb. [N. S.], 442.) Plaintiff was a creditor within the statute as to fraudulent conveyances, and entitled to protection as such. (2 Edm. Stat., 142, § 1; *Nicholson* v. *Leavitt*, 6 N. Y., 515; *Cadogan* v. *Kennett*, Cowp., 434; *Twyne's Case*, 1 S. L. Cas., 36; *Fox* v. *Hills*, 1 Conn., 295; *Jackson* v. *Myers*, 18 J. R., 425; *Jackson* v. *Seward*, 5 Cow., 67; 8 id., 406; *Van Wyck* v. *Seward*, 18 Wend., 375; *Elwood* v. *Deifendorf*, 5 Barb., 398; *Leggett* v. *Bk. of Sing Sing*, 24 N. Y., 292; 1 Am. L. Cas. [4th ed.], 42; *Shear* v. *Shay*, 42 Ind., 375; *Pendleton* v. *Hughes*, 65 Barb., 136; *Richardson* v. *Smallwood*, Jac. Ch., 552.)

A. Hadden for the defendant. There is nothing in the fact of the making of the trust deeds from which fraud can be inferred. (2 Edm. Stat., 142, § 4; *Seymour* v. *Wilson*, 14 N. Y., 569; *Hanford* v. *Archer*, 4 Hill, 300; *Cunningham* v. *Freeborn*, 1 Edw. Ch., 260; *Babcock* v. *Eckler*, 24 N. Y., 633; *Hildreth* v. *Van Sant*, 2 J. Ch., 35; *Grover* v. *Wakeman*, 11 Wend., 195.) As Mr. Pulteney continued Mr. Fellows as his agent after the making of the deeds, as between himself and third parties, Mr. Pulteney is to blame and should bear the loss, whether the debt was prior or subsequent to the deeds. (*Hunter* v. *H. R. I. and M. Co.*, 20 Barb., 506; *Smith* v. *Empire Ins. Co.*, 25 id., 502; *Vallett* v. *Parker*, 6 Wend., 620; *Root* v. *French*, 13 id., 572; *Sandford* v. *Handy*, 23 id., 268; *Bk. of U. S.* v. *Davis*, 2 Hill, 465; *Mitchell* v. *Oakley*, 7 Paige, 69; Paley on Agency, chap. 3, pt. 3, § 2.; *Rome Ex. Bk.* v. *Eames*, 38 N. Y. [1 Keyes], 596; Law of Trusts, etc., B. & T., 1; *McLaughlin* v. *Bk. of Potomac*, 7 How. [U. S.], 229; *King* v. *Thompson*, 9 Pet., 218; *Ingalls* v. *Morgan*, 10 N. Y., 186.)

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ALLEN, J. Aside from the question of fraud, which is directly presented upon this appeal and which was the principal question discussed by counsel, another serious and important question, affecting directly the interests of individuals who are not parties to the action, and who will not therefore be concluded by any judgment that may be given, is directly involved. That is as to the effect of the several deeds from Fellows to Heermans, and whether any estate vested in Heermans, the grantee, either during the life of Fellows, the grantor, or at his death, and whether the real property mentioned in the several deeds did or did not descend directly to the heirs of Fellows. Whether a valid trust was created by the deeds, in Heermans was considered by this court, in *Heermans* v. *Robertson* (64 N. Y., 332), recently decided, but was not passed upon, for the reason that then, as now, the proper parties were not before the court so as to permit a judgment to be given, which should determine the rights of all interested. The important question was purposely left open and judgment given against the plaintiff upon grounds not affecting the claim and title of the heirs at law of Fellows.

In the present action Heermans represents the *cestuis que trust* and other beneficiaries named in the deeds, under which he asserts title, and, assuming the existence of a trust estate in Heermans, valid except as against creditors of the author of the trust, the judgment will bind, not only Heermans, but all taking or claiming title or interest under the deeds. But the judgment will not bind the heirs-at-law or others claiming as successors in interest to Fellows and adversely to the deeds. It follows, that if the judgment recovered by Pulteney against Fellows in his lifetime, should be adjudged a valid lien upon the lands and real property of the judgment debtor as against any title sought to be made under the deeds to Heermans, whether for the reason that the deeds were fraudulent and void as against creditors, or for the reason that no legal estate vested in Heermans, the judgment should only declare that fact and leave the judg-

establish a fraudulent intent. Upon proof of an existing indebtedness, the fact that the grant was of all the property of the debtor in trust for himself and for his use would be conclusive evidence of fraud and it could not be overcome by any proof of innocent intention. The referee has found that all the estate of Fellows, real and personal, was conveyed to Heermans upon the trusts and for the purposes named in the several instruments set forth in the pleadings. The direct and primary trust was for the use of the grantor during his life and the effect was necessarily to postpone the payment of debts and delay his creditors until after his death. The referee found upon this statement that the deeds were made with intent to hinder, delay and defraud creditors, and the inference was justified by the facts. Such was the legal effect of the deeds, if valid, and the law will presume that parties intend the usual and necessary consequences of their acts. A conveyance by one indebted at the time, by which the grantor secures some benefit to himself at the expense of creditors, or by which creditors are prevented from compelling an immediate appropriation of the debtor's property to the payment of his debts is deemed fraudulent and void. *A fortiori*, should deeds of conveyance be adjudged fraudulent and void, which postpone creditors in the collection of their debts until the death of the debtor and secure the use of the whole property to the latter during his life. (*Goodrich* v. *Downs*, 6 Hill, 438; *Mackee* v. *Cairns*, 5 Cow., 547; affirming S. C., Hop. Ch. R., 424; *Grover* v. *Wakeman*, 11 Wend., 187; *Barney* v. *Griffin*, 2 Com., 365; *Nicholson* v. *Leavitt*, 2 Seld., 510; *Dunham* v. *Waterman*, 17 N. Y., 9; *Freeman* v. *Pope*, L. R., 5 Ch. Ap., 538.) An assignee in trust for creditors or a grantee in a voluntary conveyance does not occupy the position of a purchaser for value and his innocence of any fraudulent intent will not protect his title if, for any reason, it may be adjudged fraudulent as to creditors. (*Griffin* v. *Marquardt*, 17 N. Y., 28.) The conveyance now attacked was made in October, 1868, and was modified in respect to some of the trusts by instruments made during

succeeding months. At the time of the grant, Fellows was the agent of the plaintiff intestate, who was an alien residing in Great Britain and was in the receipt of large sums of money belonging to him and had, prior to that time, invested of funds, belonging to his principal a large sum in sundry securities, including government bonds, railway stocks, etc., taking the transfer to himself as trustee. These securities were in his possession at the time of the execution of the principal grant and the several instruments following; and, holding them as agent and trustee, he was liable to account for them and the interest and income derived from them when called upon. In 1871 his agency terminated and he was called upon to account for and deliver to his successor in the agency and for the principal, the securities thus held by him, but failed to comply with the demand, and an action was brought resulting in a judgment for nearly $150,000, upon which an execution was issued and returned unsatisfied and upon which this action is based. Although there may not have been a complete and perfect cause of action at the time of the deed from Fellows, for the reason that there had been no demand of a transfer and surrender of the securities, there was a fiduciary obligation and a contingent liability to respond in money to the value of the securities, depending upon his own acts and his fidelity to the trust, and from which an absolute liability ensued.

There can be no serious question that Mr. Pulteney, the plaintiff intestate, was, under the circumstances and within the true meaning of the statute against fraudulent conveyances, a creditor. The statute has always had a liberal interpretation, for the prevention of frauds and the term creditor has not received a restricted or limited interpretation. A suit to set aside a settlement as fraudulent against creditors was entertained when the plaintiff subsequently became a creditor by the breach of a covenant previously entered into by the settler. (*Richardson* v. *Smallard*, 1 Jac. C. R., 552.) It is not necessary to show, in order to impeach this deed for fraud, that the grantor actually contemplated a misappropriation or

conversion of the securities of the intestate. It is sufficient that, having these securities in his possession, he transferred his entire property without consideration and did not account for them to the rightful owner. It is not necessary to show that he contemplated an actual indebtedness to ensue from his dealings with the principal or with or in respect to his agency and trust. (*Mackay* v. *Douglass, supra.*) An assignment was set aside at the suit of B., who was a creditor of the assignee upon a running account upon which the assignor was indebted at the time of the assignment, but upon which payment had been made more than sufficient to pay the whole sum then due, so that the whole indebtedness remaining accrued after the assignment. (*Whittington* v. *Jennings*, 6 Simons, 493.) It has been repeatedly adjudged that a party bound by a contract whereof he may become liable to the payment of money, although his liability be contingent, is a debtor within the meaning of the statute avoiding all grants made to hinder or delay creditors. (*Van Wyck* v. *Seward*, 18 W. R., 375, per BRONSON, J., at page 383 *et seq.* and cases cited.) It would be a reproach to the law if a creditor, becoming such under the circumstances appearing in this action, could not have the benefit of the statute but must suffer the loss of his debt in favor of one claiming under a voluntary grant from the debtor and for his use. An honest construction of the instruments would have justified the payment of this debt after the death of Fellows as one of the debts provided for to be paid after such death. But the courts were open and the grantee had the legal right to contest the claim of the creditor after the trust for the payment of debts became operative by the death of the debtor, if the trust was valid or a power in trust existed. The plaintiff is entitled to a judgment declaring the conveyances void as against him and declaring his judgment a lien upon the real property conveyed by Fellows as against the grantee, Heermans, as if no conveyance had been made by the judgment debtor, with leave to him to proceed by execution against the lands conveyed according to the course and practice of the

court. By this judgment the deeds to Fellows will no longer be an obstacle to the collection of the judgment. This is the proper judgment when, as in this case, by reason of a defect of parties, a perfect title cannot be made under an equitable execution or a sale by a receiver.

That part of the judgment of the Supreme Court which declares that the judgment is not a lien upon the lands and appoints a receiver of the real property must be reversed and the judgment modified to conform to the views expressed.

As both parties have appealed and neither has succeeded, neither should recover costs in this court as against the other.

All concur.

Judgment accordingly.

EPHRIAM D. BROWN, Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

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The provisions of the statute authorizing summary proceedings by a landlord to dispossess a tenant for non-payment of rent (2 R. S., 512, § 28, as amended, chap. 828, Laws of 1868) apply to and include proceedings against corporate bodies as well as individuals.

Summary proceedings were commenced in a District Court of the city of New York by plaintiff against the defendant and the board of police commissioners. The affidavit and summons alleged that defendant was the tenant, and occupied through itself and the said board as undertenants. Defendant did not appear, but the board appeared, and, by consent, the matter was adjourned. *Held*, that the adjournment was proper, and that the court was not thereby ousted of jurisdiction to proceed on the adjourned day against defendant.

The affidavit, upon which the proceedings were based, was sworn to before a notary public. *Held*, that it was properly verified. (§ 4, chap. 741, Laws of 1870.)

A judgment taken by default in summary proceedings for non-payment of rent, until reversed, set aside or vacated, is conclusive in an action by the landlord against the tenant to recover the rent, of the facts alleged in the affidavit, and which are required by the statute to be alleged as the basis of the proceedings, to wit: the tenancy, the occupation by the tenant, the non-payment of rent due, and the holding over after default in payment.

(Argued June 5, 1876; decided June 13, 1876.)

Statement of case.

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York affirming a judgment in favor of plaintiff, entered upon a verdict.

The nature of the action and the facts are set forth sufficiently in the opinion.

James C. Carter for the appellant. The statute authorizing summary proceedings for the recovery of the possession of premises does not authorize them to be instituted against corporate bodies. (R. S., pt. 3, chap. 8, tit. 10, art. 2, § 28; Laws 1868, chap. 828, p. 1930; *Faulkner* v. *D. and. R. C. Co.*, 1 Den., 441; *School Directors* v. *Carlisle Bk.*, 8 Watts, 291; *Ministers, etc.*, v. *Adams*, 5 J. R., 347.) The adjournment was a fatal discontinuance, and all proceedings thereafter were *coram non judice* and void. (*Hogan* v. *Baker*, 2 E. D. S., 22; *Wiest* v. *Critsinger*, 4 J. R., 117; *Redfield* v. *Florence*, 2 E. D. S., 339; *Wight* v. *McClave*, 3 id., 316; *Aberhall* v. *Roach*, id., 345; *Gamage* v. *Law*, 2 J. R., 192; *Proudfit* v. *Henman*, 8 id., 305; *Dunham* v. *Heyden*, 7 id., 381; *Allen* v. *Edwards*, 3 Hill, 499; *Colden* v. *Dopkin*, 3 Cai., 171; 2 R. S., 515, § 41; *Nichols* v. *Williams*, 8 Cow., 13.) The affidavit upon which the process issued was not verified before the proper officer, and the proceedings were void. (R. S., pt. 3, chap. 8, tit. 10, art. 2; Laws 1863, chap. 189, p. 328; *King* v. *Cole*, 6 T. R., 640; *Haight* v. *Turner*, 2 J. R., 371; *People* v. *Tioga C. P.*, 1 Wend., 291.)

Thomas Allison for the respondent. Summary proceedings can be instituted against corporations. (2 R. S. [Edm. ed.], 529, § 28; 3 R. S. [5th ed.], 1106 [m. p. 778], § 11; Tidd's Pr., 12; A. and A. on Corp., § 637; *McQueen* v. *Mid. Man. Co.*, 16 J. R., 7; *Pond* v. *H. R. R. R. Co.*, 17 How. Pr., 543; *Conroe* v. *Nat. Pro. Ins. Co.*, 10 id., 403; *Crowley* v. *Pan. R. R. Co.*, 30 Barb., 99; *Olcott* v. *Tioga R. R. Co.*, 20 N. Y., 210.) The adjournment was proper. (2 R. S. [Edm. ed.], 532, § 41; 1 Laws 1857, chap. 344, § 78, p. 728;

Hard v. *Shipman*, 6 Barb., 621, 630; *People* v. *Ulrich*, 2 Abb. Pr., 28, 29.) The affidavit on which the proceedings were founded was properly verified before a notary public. (Laws 1870, chap. 741, § 4; Code, § 66; Laws 1863, chap. 189; *People* v. *Dudley*, 58 N. Y., 323.)

EARL, J. This is an action to recover the rent of certain premises situated in the city of New York, claimed by the plaintiff to have been leased to and occupied by the defendant. For the purpose of proving the leasing, occupancy and liability to pay rent, the plaintiff produced the summary proceedings taken in the Eighth District Court of the city by plaintiff against defendant and the board of police commissioners to dispossess them for the non-payment of rent. The affidavits alleged the leasing of the premises to the city corporation, the occupation by the corporation and by the board of police commissioners as under-tenants, the non-payment of seven-quarters' rent which had become due and payable, a demand of payment and a holding over without permission after default. The affidavit was sworn to before a notary public. The record showed that on the return day of the summons the city corporation did not appear; that the board of police commissioners appeared, but filed no counter affidavit; that by consent the matter was adjourned two days, and upon the adjourned day judgment was rendered that plaintiff have possession, etc. Plaintiff made no other proof and rested. Defendant then moved that the complaint be dismissed, on the ground that no cause of action had been proven. The court denied the motion, and, defendant offering no proof, it directed a verdict for the plaintiff; and the exceptions of the defendant to these rulings of the court present the questions to be considered upon this appeal.

The claim of the plaintiff is that the judgment and proceedings in the District Court conclusively establish the defendant's liability for the rent. This claim is disputed by the defendant upon several grounds, which I will consider separately.

Opinion of the Court, per EARL, J.

1. It is said that the statute authorizing the summary proceedings for the recovery of the possession of premises does not authorize them to be instituted against corporate bodies; and that the proceedings proven upon the trial, so far as they relate either to the city or the county of New York, were therefore *coram non judice*.

The Revised Statutes, as amended by section 2 of chapter 828 of the Laws of 1868, provide that the summons issued in such summary proceedings shall be served by delivering to the tenant a true copy thereof and at the same time showing him the original; or if such tenant be absent from his place of residence, by leaving a copy thereof at such place with some person of mature age residing upon the premises; and if no such person can be found, then further provision is made for the service. The claim of the learned counsel for the defendant is that these provisions as to the services of the summons plainly have reference to natural persons only, such as can have an actual residence and be absent therefrom and incapable of being found, and that these conditions cannot be predicated of corporations.

It is provided (2 R. S., 778, § 11) that whenever in any statute a party or person is referred to or described, bodies corporate shall be deemed to be included unless it be otherwise specially provided, or unless there be something in the subject or context repugnant to such construction. We have no reason to suppose that such summary proceedings were not intended to apply to bodies corporate. And there is no reason that they should not apply to them, and there is no practical difficulty in executing the law against them. The mode of service first pointed out in the statute is to be used in proceedings against bodies corporate, and service upon the mayor is a good service upon the corporation in a case like this. (Laws of 1860, chap. 379, § 4; *Matter of McQueen* v. *Med. Man. Co.*, 16 J. R., 5; A. & A. on Cor., § 637.)

While corporations are artificial, intangible, invisible beings, yet they are treated in various statutes and decisions as per-

sons, occupants, inhabitants, citizens. (*Buffalo and State L. Railroad Co. v. Supr. of Erie*, 48 N. Y., 93.) The corporation of the city of New York has its residence within the territorial limits of the city and can reside nowhere else, and hence it can never be absent from the city. Therefore, the contingencies can never arise when service upon such a corporation can be made, except in the manner above mentioned. Ample provision is made for service of the summons upon both natural and artificial persons, and there is nothing in the context or subject-matter of the act which shows that it was the intention to exclude corporations from its operation.

2. The allegation in the affidavit and summons was, that the defendants were the tenants of the premises and occupied them through themselves and the board of police commissioners as under-tenants. The summons was also served upon the board of police commissioners, and on the return day this defendant did not appear, but the board of police commissioners did appear, and by consent the matter was adjourned for two days. It is now claimed that this adjournment ousted the justice of his jurisdiction and worked a discontinuance of the proceeding, and that, therefore, he had no right to proceed in the cause on the adjourned day. The board of police commissioners were summoned to appear, and they had the right to appear and contest the matter. They did appear and they and the plaintiff consented to the adjournment. This defendant suffered default and hence was not there to be heard or to object. The cause could not proceed as against it until it was ready for trial as against all the parties; and hence, there was no error in an adjournment by the consent or upon the request of the other parties. (2 R. S. 516, § 41; Laws of 1857, chap. 344, § 78.)

3. The affidavit upon which the summary proceedings were based was sworn to before a notary public, and it is objected that the proceedings were without jurisdiction, for the further reason that the affidavit was not sworn to before the clerk or his deputy as required by chapter 189 of the laws of 1863. But in 1870 (chap. 741, § 4), it was provided that the "affidavits

used in such proceedings may be taken before any officer authorized by law to take affidavits." This affidavit was used to institute the proceedings, and according to common understanding, and hence, presumably within the meaning of the legislature, was used in the proceedings. It was, therefore properly taken before a notary public.

It is, therefore, clear, that the justice had jurisdiction of the proceedings, and the only other question to be considered is, as to the conclusive effect of the adjudication made in the proceedings.

4. When a matter in controversy between parties has been submitted to a competent judicial tribunal, its decision thereon is final between the parties until it has been reversed, set aside or vacated; and the rule of *res adjudicata*, applies not only to the judgments of courts, but to all judicial determinations, whether made by courts in ordinary actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. It applies not only to judgments rendered after a litigation of the matter in controversy, but to judgments rendered upon default or confession. (*Gates* v. *Preston*, 41 N. Y., 113; *Newton* v. *Houck*, 48 N. Y., 676.)

The statute (2 R. S. 513, § 28), provides that a tenant may be removed from the demised premises when he holds over after any default in the payment of rent and a demand of the rent has been made, and a three days' notice in writing requiring the payment of the rent or the possession of the premises has been served. The landlord must make oath of the facts which authorize the removal of the tenant, and the magistrate is then required to issue his summons describing the premises and requiring any person in possession, or claiming possession, to remove from the same or show cause, on a day named, why possession shall not be delivered to the landlord. (§§ 29, 30.) If on the return day no sufficient cause be shown to the contrary, the magistrate is required to issue his warrant to put the landlord in possession. (§ 33.) If the person proceeded against obeys

the summons and removes from the premises before the return day, he can appear on that day, and show the fact of his removal, and then no warrant can be issued. If it is not true that he was in possession or claimed possession when the summons was issued, he can appear and show that for cause why a warrant should not issue or a judgment be rendered against him. If he does not appear at all, he admits the allegations contained in the affidavit, and the magistrate is bound to render judgment and issue his warrant against the tenant and other persons in possession or claiming possession. (§ 51.) There is, therefore, a regular judicial proceeding instituted by service of process. The party proceeded against is informed of the claim made against him, and he is called upon to contest it. If he suffer default, judgment is rendered against him. That such a determination is conclusive as to every thing upon which it depends cannot well be doubted. It has been held to be in several reported cases. (*Yonkers and N. Y. Fire Ins. Co.* v. *Bishop*, 1 Daly, 449; *Kelsey* v. *Ward*, 16 Abb. Pr. R., 98; *Powers* v. *Witty*, 42 How. Pr., 352; *Sage* v. *Harpending*, 49 Barb, 166; *White* v. *Coatsworth*, 6 N. Y., 137; *Supervisors, etc.* v. *Briggs*, 2 Denio, 26, 33; *Demarest* v. *Darg*, 32 N. Y., 281, 290.)

It is said that these proceedings can only be instituted against a party in possession or claiming possession of the demised premises. This is undoubtedly so. But here the affidavit shows that the defendants hired and possessed the premises, that the specified amount of rent had become due, and had been demanded, and that the defendants had not paid the rent or surrendered the possession of the premises. The same facts are recited in the summons served upon the defendants. They are the facts required by the statute to be alleged as the basis of the proceedings, and the defendants by their default admitted them to be true.

No error was therefore committed in the Supreme Court, and the judgment must be affirmed.

All concur.

Judgment affirmed.

Statement of case.

WILLIAM ALLEN BUTLER et al., Executors, etc., Respondents, v. WILLIAM SPRAGUE et al., Respondents, J. B. VIROLET, Petitioner, etc., Appellant.

The firm of V. & B. consigned their goods to the firm of H., S. & Co., commission merchants, for sale. V. agreed with H., S. & Co. to secure advances made to his firm by keeping on deposit with them funds sufficient for that purpose. He had then standing to his individual credit $50,000. He thereafter drew drafts and made deposits, and statements of the account were made to him from time to time, in which he was allowed interest on the credits and charged interest on the debits. V. & B. received advances at times larger than the balance due V. H., S. & Co. suspended, owing V. $18,545.26. V. & B.'s account was closed and any balance paid. A receiver was appointed of the property of H., S. & Co. V. moved that the receiver be required to pay him the balance so due, on the ground that it was a special deposit in the hands of the receiver. *Held*, that the motion was properly denied; that the receiver had no property which belonged to V., or upon which he had a legal or equitable lien; and that he was simply a creditor of the insolvent firm with no more right to the specific amount of his claim than any other creditor.

Also *held*, that even if V. had shown that he made a special deposit, he could only recover it in case he found the same money in the hands of the receiver, or property in which it had been wrongfully invested or which had been wrongfully substituted for it; that if wrongfully converted by H., S. & Co. the only claim of V. against the insolvent estate was that of a creditor.

(Argued June 6, 1876; decided June 18, 1876.)

APPEAL by J. B. Virolet from an order of the General Term of the Supreme Court in the second judicial department, affirming an order of Special Term denying a motion to confirm a referee's report.

Said Virolet moved, upon a petition, for an order directing the receiver of Hoyt, Sprague & Co. to pay over to him from the assets in his hands, as receiver, the sum of $18,545.26. A reference was ordered, the referee to take proof of the facts and report the same with his conclusions of law. The referee reported in favor of the petitioner. The facts found by him, and other material facts, are sufficiently stated in the opinion.

Opinion of the Court, per EARL, J.

James McKeen for the appellant. Money may be the subject of the ordinary contract of pledge. (Story on Bail., 342, § 290; *Van Alan* v. *Am. Nat. Bk.*, 52 N. Y., 1, 8, 9; *Ex parte Sayres*, 5 Ves., 169; *Byron* v. *Brandreth*, L. R., 16 Eq. Cas., 475; *Horton* v. *Morgan*. 19 N. Y., 170; *Nourse* v. *Prime*, 4 J. Ch., 491; 7 id., 88; *Kimberly* v. *Patchin*, 19 N. Y., 330.) The fund claimed was deposited for a special purpose and therefore clothed with a trust. (*Toovey* v. *Milne*, 2 B. & Ald., 583; *Edwards* v. *Glyn* [1859], L. J., 28 Q. B., pt. 2, 359; Am. L. Cas., 520; *McDonough* v. *Delasus*, 10 Robt. L. R., 487.)

Geo. C. Holt for the respondents. The liability of Hoyt, Sprague & Co. to Mr. Virolet was the same as that of banker to depositor. (Morse on Banking, 25, 39; *Ætna Nat. Bk.* v, *Fourth Nat. Bk.*, 46 N. Y., 82; *Watts* v. *Christie*, 11 Beav., 546; *Beebe* v. *Bull*, 12 Wend., 504; *Laden* v. *Hart*, 4 Wend., 583; Lindley on Part. [3d ed.], 1165; *In re Franklin Bk.*, 1 Paige, 249; *Chapman* v. *White*, 6 N. Y., 412; *Marsh* v. *Oneida Cent. Bk.*, 34 Barb., 298.)

EARL, J. The petitioner, Virolet, prior to August, 1868, had been engaged in the business of manufacturing oil-cloth, and consigned his goods to Hoyt, Sprague & Co., for sale upon commission. In that month he formed a copartnership with W. J. Bruen for the same business, and the firm continued to consign their goods to Hoyt, Sprague & Co., as their factors. About October 1, 1868, Virolet contemplated a visit to Europe and an absence of some considerable time from this country, and wished to make some arrangement with Hoyt, Sprague & Co. for advances to his firm during his absence, if they should be required. He, accordingly, went to them and proposed to leave on deposit with them, and from time to time to deposit with them, funds sufficient to secure them for any advances which they might make to his firm. At that time he had standing to his credit in account with them upwards of $50,000. He went to Europe

and remained there about five years, and during that time he drew drafts on them and made deposits with them from time to time, and the balance due him was constantly varying, sometimes being quite small. They, from time to time, rendered him statements of his accounts, in which they allowed him interest on his credits and charged him interest on his debits. In October, 1873, they suspended and became insolvent, then owing him $18,545.26, the balance due him upon his account. The firm of Virolet and Bruen had consigned their goods to Hoyt, Sprague & Co. for sale upon commission, and had, from time to time, received advances, sometimes to an amount larger than the balance at the time due Virolet from them, and, after their suspension, the firm paid them any balance due from it. A receiver was appointed in this action of the property of Hoyt, Sprague & Co., and Virolet made a motion to compel the receiver to pay him the balance above stated, on the alleged ground that the money was a special deposit, and must be treated as in the possession of the receiver, and he complains, upon this appeal, that he had thus far been wrongfully defeated in his application.

It seems quite clear that he was simply a creditor of the insolvent firm. He kept, on general deposit with them, a certain amount of money, for which they became indebted to him. It was not understood that they were to keep on hand the same money, or any particular money or property. It must have been the understanding that they could use it, as they allowed him interest for his credits. The account with him was a debt and credit account, interest being allowed on one side and charged on the other. They had the right to do what they chose with the money, and the balance due from them to him was to be their security for sums which they might advance to his firm. They were not to be secured by keeping the identical money, but by the balance of account due him. When they suspended they had no money which he had placed in their hands, and nothing which represented that money. Hence there is no authority for

Statement of case

holding that he could claim a preference over other creditors of the insolvent firm. The receiver had no property which belonged to him, and none upon which he had either a legal or equitable lien. He had no more right to the specific amount or fund claimed by him than any other creditor. (*The Matter of the Franklin Bank*, 1 Paige, 249; *Chapman* v. *White*, 6 N. Y., 412.)

If, however, he had been able to show that he had made special deposits with the insolvent firm for the purpose mentioned, he would have been, upon the facts proved, in no better condition. In that case, if he had found the same money in their hands, or property in which they had wrongfully invested it, or which they had wrongfully substituted for it, he could have claimed it, and his right to it would have been recognized. (*Cook* v. *Tullis*, 18 Wal., 332; *Clark* v. *Iselin*, 21 id., 360; *Van Alen* v. *American Nat. Bank*, 52 N. Y., 1.) But here he has not found the same money deposited by him, and he has not shown that it is represented by any of the property which went into the hands of the receiver. If they wrongfully converted the money therefore, his only claim against the insolvent estate is that of a creditor on a footing of equality with the other creditors.

The order must be affirmed, with costs.

All concur.

Order affirmed.

IN THE MATTER OF THE PETITION OF THE SECOND AVENUE METHODIST EPISCOPAL CHURCH TO VACATE AN ASSESSMENT.

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A municipal corporation seeking to affect property within its jurisdiction by taxation, or proceedings in the nature thereof, must produce express power therefor in legislative enactment, and must show that it has strictly followed all the legal requirements.

Where a power is granted by legislative enactment, with a proviso annexed, the enactment is to be read as if no more power was ever given than is contained within the terms or bounds of the proviso.

Statement of case.

The power of the corporation of the city of New York to assess for local improvements all property benefited thereby is limited by the provision in the act of 1840 (§ 7, chap. 326, Laws of 1840) prohibiting an assessment exceeding half the value of the property, as valued by the general tax assessing officers, and can only be exercised as to property which has been previously valued by said officers, and then only to an amount not greater than half the value named by them. (RAPALLO and ANDREWS, JJ., dissenting.)

This proviso applies as well to property of religious corporations used for religious purposes on which, as it is exempted from taxation, the assessors of the ward are not required by law to make a valuation as to other property. (RAPALLO and ANDREWS, JJ., dissenting.)

Accordingly, *held* (RAPALLO and ANDREWS, JJ., dissenting), where, upon a motion to vacate an assessment upon such property, it did not appear that there was an assessment roll made by the tax commissioner and deputy upon which the property appeared, with a valuation attached, that the assessment was illegal and void.

Also, *held*, that the acts of 1874 (chaps. 312 and 313, Laws of 1874), providing that no assessment for a local improvement shall be vacated for an omission in the performance of any official duty, or in carrying out the details of a law or ordinance, or for any defect in authority, or for any irregularity, did not apply, as it was not simply a defect, omission or irregularity, but a total absence of power; and that, therefore, the assessment was properly vacated.

In re Methodist Episcopal Church (5 Hun, 442) reversed.

(Argued June 6, 1876; decided June 13, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, reversing an order of Special Term, vacating assessments for paving One hundred and nineteenth street from Third avenue to Avenue A, and for paving Second avenue from Eighty-sixth to One Hundred and Twenty-fifth streets, in the city of New York. (Reported below, 5 Hun, 442.)

The petitioner is a religious corporation, and the lots assessed are owned and used by it for public worship.

The application to vacate the assessment was made upon the ground that no valuation was ever put upon the property in the assessment roll by the general tax assessing officers, and that, therefore, the assessments in question were more than one-half the amount of the assessed valuation, and so void under the act chapter 326, Laws of 1840, section 7.

Opinion of the Court, per FOLGER, J.

Alexander B. Johnson for the appellant. No valuation having been placed upon petitioner's land by the tax commissioners or their deputies, the assessment is void. (Laws 1840, chap. 326, § 7; Laws 1859, chap. 302, § 2; *In re Palmer*, 31 How., 42; *Nat. Bk. of Chemung* v. *Elmira*, 53 N. Y., 49; *Turfler's Case*, 19 Abb., 149; *First Presb. Church* v. *City of Fort Wayne*, 36 Ind., 338; 4 U. S. Dig., 491 [1873]; *Voorhees* v. *Bk. of U. S.*, 10 Pet., 449; *Prosser* v. *Secor*, 5 Barb., 608.) Where persons are to be divested of their property by statute, the directions of the statute must be strictly followed. (*Whitney* v. *Thomas*, 23 N. Y., 286; *Westfield* v. *Preston*, 49 id., 349; *Howell* v. *Buffalo*, 15 id., 512; *Sharp* v. *Spier*, 4 Hill, 76, 92; *Palmer* v. *Lawrence*, 6 Lans., 282; *Doughty* v. *Hope*, 3 Den., 594; *Henderson* v. *Baltimore*, 8 Md., 352.) The laws of 1872 and 1874 cannot be held to impose the assessments on petitioner's property. (*Denny* v. *Mattoon*, 2 Al., 361; *Nelson* v. *Rountree*, 23 Wis., 367; *Griffin* v. *Cunningham*, 20 Grat., 81; *Mayor, etc.*, v. *Horn*, 26 Md., 194; *McDaniel* v. *Correll*, 19 Ill., 226.)

J. A. Beall for the respondent. The omission of the tax commissioners to value the lots sought to be assessed furnishes no ground for vacating the assessments. (2 Laws 1872, chap. 580, § 7, p. 1416; Laws 1874, chap. 313, p. 366; *In re Meyer*, 50 N. Y., 504; *In re VanAntwerp*, 56 id., 261; *Lennon* v. *Mayor, etc.*, 55 id., 361.)

FOLGER, J. The appellant concedes, and it may be assumed, that its property was not, by any express provision of law, exempt from an assessment of the nature of the one in question. If the manner of laying the assessment upon that property, was in accordance with law, the appellant may not escape. Whether it was or not depends, in the first place, upon which party to the controversy has the substantial affirmative upon it. If the appellant is required to establish, that the city has exceeded the limit of one-half the valuation placed upon its property by the officers authorized to make valuation, the appellant is unable to do so, for where no valu-

ation has been made, any sum assessed cannot, in strictness, be said to exceed one-half of the valuation made. But the substantial affirmative is not upon the appellant. It is a rule, that the municipality which seeks to effect the property within its jurisdiction, by taxation or proceeding in the nature thereof, must produce express power therefor in legislative enactment, and must show that in its attempt to tax, it has strictly followed all the legal requirements. It, seems then, that the substantial affirmative is upon the city. It does, indeed, upon the concession and assumption above noted, have the abstract power to assess the property of a religious corporation, used for religious purposes, inasmuch as it has the power to assess for a local improvement, all property benefited thereby which is not exempted from assessment. But there is a limit to that power, in the amount to which it may carry its assessment. It may assess up to one-half the value placed upon the property by certain of its officers. To justify its assessment in this case, it must show that it has kept within that limit; that it has not assessed more than one-half the value. It cannot show that, without showing what was the value named by those officers. This it cannot do, for no value has been placed upon it by them. Practically, it is as if the law authorized the city to assess, upon the basis of a prior existing assessment roll, and not to exceed in the assessment put upon any piece of property, an amount equal to one-half the valuation placed upon that piece in that prior assessment roll. If there be no assessment roll at all, or no roll upon which appears that piece of property, with a valuation attached to it, how can the city make it appear that it has kept within the power given to it by law?

It is a power given, with a proviso annexed. The demand of the proviso must be answered, as a prerequisite to a legitimate exercise of the power. The city is unable to show that demand answered, for the reason that the facts do not exist by which the extent of the demand may be measured. The respondent claims that it does not appear, that there was not a valuation before the term of five years before the trial. But

it has not proven that there was. It is apparent that the case proceeded upon the tacit assumption, that there had never been a valuation put upon the lots by the ward assessors or by their succcessors.

In the second place, however, if this limitation was not intended to apply to such a case as that of the appellant, then a liability to the assessment may exist. It is said that the provision, limiting the amount of assessment to one-half the valuation fixed by the tax-assessing officers, could not have been meant to apply to a case, in which those officers were not required by law to make a valuation. The difficulty in assenting to this idea is, that it does not take a correct notion of the extent and character of the power given. A proviso in a grant or enactment, is something taken back from the power first declared. The grant or enactment is to be read, not as if the larger power was ever given, but as if no more was ever given than is contained within the terms or bounds of the proviso. The authority to the city, in the purview of the proviso, is no more than to assess for local improvements all property benefited thereby, when that property has been previously valued by the general tax assessing officers, and then, not to an amount greater than half the value named by them. Said the legislature to the city, this and no more: you may assess any piece of property for local improvements one-half of the value placed upon it by certain of your officers. A valuation previous to assessment thus becomes the chief basis of the power to assess at all. It would be an interpolation in the act to insert, as a further declaration: if those officers have made no valuation, then you may assess at your discretion. It would be more than is found in the language of the act, and more than can be fairly implied from it. The correct conclusion is, that the draftsman of the law overlooked the fact that some property, by reason of exemption from general taxation, would not be valued at all. If this act read in terms: the city may assess for local improvements all property which has been valued by tax commissioners, not to exceed one-half of the valuation given to it

by them, there could be no implication therefrom that property not valued might be assessed. Yet, the true office of the proviso in this act, is to reduce the meaning of the latter to just those terms.

In the third place, it is to see, whether there is other legislation than that already noticed, which affects the question. It is not contended that there is any, adverse to the appellant, unless it is found in the acts of 1874 (Laws of 1874, chap. 312, p. 366; id., chap. 313, p. 366). It is there provided that no assessment for a local improvement shall be vacated; first: For the omission of any officer to perform any duty imposed upon him; second: For any defect in the authority of any department or officer to perform any duty imposed upon him; third: For any omission to carry out the detail of any law or ordinance; fourth: For any irregularity, unless the case be one of fraud, or an assessment for repaving; and that all property benefitted by a local improvement shall be liable to an assessment therefor, notwithstanding omission, defect in authority or irregularity. The matter alleged by the appellant is not an irregularity, it is lack of fundamental power; it is not an omission to carry out the detail of a law, it is the total want of authorizing law; it is not a defect in the authority to perform a duty imposed, which supposes an official obligation without power adequate, but it is a case of no power given because no duty is imposed; it is not an omission to perform a duty imposed, but a case where, as last said, there is no duty created.

There is a legislative *casus omissus*. We have no reason to suppose, that the legislature would have purposely withheld from the city, the power to assess such property for such object. It did not, however, by the terms of the statute make a grant of it. As the power may not be exercised without an express grant, we must hold that the city may not exert it.

The order of the General Term should be reversed, and that of the Special Term affirmed.

All concur, except RAPALLO and ANDREWS, JJ., dissenting.

Ordered accordingly.

Statement of case.

ELEANOR E. BRANDOW, Executrix, etc., Appellant, v. ABRAM W. BRANDOW et al., Respondents.

The will of B. gave to his wife all his real and personal estate during her life, she to provide and care for their children until they came of age, and directed that after her death "all the real estate which may be found" should be divided among the sons and the personal estate among the daughters. The widow died before the children became of age. In an action brought to charge the support of all the children, after the death of the widow, upon the real estate, *held*, that the provision for the support of the children terminated at the death of the widow, and, thereupon, the sons became entitled to a division of the real estate remaining; and that the same was not chargeable with the support of the daughters.

(Argued June 5, 1876; decided June 13, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the third judicial department, reversing a judgment in favor of plaintiff, entered upon a decision of the court, on trial at Special Term. (Reported below, 4 T. & C., 385.)

This action was brought by plaintiff, as executrix of the will of Nicholas Brandow, deceased, to recover moneys alleged to have been expended by the testator, as guardian for the infant children of Lucas E. Brandow, and in case there were no moneys to pay the same to charge the payment upon the real estate left by said Lucas. The facts, as found by the court, are, in substance, as follows:

Lucas E. Brandow died March 15, 1859, leaving a last will and testatment, the material clause in which was as follows:

"In the second place, after my debts and funeral expenses are paid, I do hereby will, in trust, to my wife Elizabeth, all my property, both personal and real, whatsoever and wheresoever during her lifetime; in consideration of which it shall be her duty to care, provide and educate our children until they are of age. After her death all the real estate which may be found is to be divided equally among my sons; and all my personal property which shall be found then shall be equally divided among my daughters."

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He left him surviving his widow Elizabeth and eight minor children, four sons and four daughters.

He owned a large farm, the premises described in the complaint, and considerable personal property.

The will was admitted to probate, and Elizabeth Brandow, the widow, and said Nicholas Brandow were appointed administrators of the estate, with the will annexed. They qualified as such and entered upon the discharge of their duties. An action was brought in May, 1859, in behalf of Elizabeth, to obtain a construction of the will, and the General Term of the Supreme Court, in that action, decided that it gave her a life estate in and to the whole real and personal estate, and authorized her to use so much of the said estate, both real and personal, over and above the annual income thereof, as may be necessary for the maintenance and education of the said children during their minority. Elizabeth took charge of the children and all the real and personal estate; provided for, educated and maintained the children, and carried on the farm — using, selling and disposing of so much of the property, as was necessary for such purposes, from the death of Lucas in 1859, and executed and performed the duties imposed upon her under the trust created by the will until March 10, 1861, when she died. Upon her death Nicholas Brandow, the surviving administrator, who was the brother of Lucas and the uncle of the children, took upon himself the execution of the trust. He took possession of and carried on the farm, received its rents, issues and profits, provided and maintained all the children together upon the homestead; he paid for their clothes and schooling and expended moneys in their behalf as a family. These expenditures were made by him in good faith, and under the belief that he was the proper and legal guardian of the children, and that it was his legal duty as such, and as administrator, and under the terms of the will, to maintain, provide for and educate the children; said Nicholas thus acted for the infants from the death of Elizabeth until the 5th day of August, 1863, when he resigned his trust to Burton G. Morss, who, on

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that day, was appointed general guardian for the infants. All matters pertaining to the infants, their lands, personal property and maintenance, were thereupon settled by and between Nicholas Brandow and the general guardian, and all property in his hands was turned over to the latter, excepting that the claims above stated were left unsettled, Nicholas supposing them to be proper charges in his account as administrator of the estate of Lucas, and for this reason were not presented.

On the 28th day of September, 1867, a final accounting was had before the surrogate in the estate of Lucas E. Brandow, deceased. The account rendered at that time by Nicholas Brandow, as administrator, contained the items of expenditure above specified; the general guardian Morss objected to these items, on the ground they were not proper items to be included in the said account; that they were charges against the heirs and not the estate. Thereupon said items of expenditures were taken out and a decree was entered closing up and settling said estate, exclusive of the said items; and Morss agreed, in consideration of the withdrawal of said claims, that he would pay to Nicholas the amount so expended by him out of any funds or property in his hands belonging to the said infants. The personal property belonging to the estate of Lucas was all exhausted in the course of administration, and there was no personal property in the hands of the general guardian, or otherwise, belonging to said infants from which to pay the plaintiff's claim.

As conclusion of law the court found that plaintiff was entitled to judgment as asked in the complaint.

James B. Olney for the appellant. The title to the real estate vested in the testator's sons, subject to the life estate of the widow, and the execution of the special power in trust in favor of all the infants. (1 Edms. Stat., 684, § 95; *Sterreche* v. *Dickinson*, 9 Barb., 516; 4 Kent, 313, 319; 4 East, 441; 3 Bur., 1446; 11 J. R., 171; 3 Sandf., 555; *Smith* v. *Bowm*, 35 N. Y., 83; Adams' Eq. [6th ed.], 105; 1 Spence Orig. Jur., chap. 81.) The power in trust survived the widow, and

the court will execute it. (*Dominick* v. *Sayre*, 3 Sandf., 555; 2 J. Ch., 1; 5 Barb., 190; 14 J. R., 537; Wil. Eq. Jur., 84; 1 Edm. Stat., 684, 685, § 100.) The infants are entitled to the whole estate for their support and maintenance during minority. (4 N. Y. S. C., 387.)

R. H. King for the respondents. The trust, as to the support and maintenance of the children, continued only until the death of the widow. (3 R. S. [5th ed.], 157, § 22; id., 22, § 87; id., 2, § 5; *Hawley* v. *James*, 16 Wend., 61; *Gott* v. *Cook*, 7 Paige, 521; 24 Wend., 641; *Post* v. *Hover*, 30 Barb., 312; *Scott* v. *Monell*, 5 N. Y. Sup. R., 431.)

ANDREWS, J. The Supreme Court, in the action brought to obtain a construction of the will of Lucas E. Brandow, decided that it vested in Elizabeth Brandow, his widow, a life estate in the whole real and personal property of the testator, and an authority to use so much of the real and personal estate beyond the annual income thereof as might be necessary for the education and maintenance of the testator's children during their minority. That action was tried at Special Term in 1859, and the judgment of the Special Term was affirmed by the General Term. All the persons interested were made parties, and no appeal was taken from the judgment of the General Term. That judgment is therefore conclusive as to all questions determined and adjudged thereby. Two questions only were adjudicated: first, that the widow took under the will a life estate in the whole property, and, second, that it conferred upon her a power to use the *corpus* of the property, if necessary, for the support and education of the minor children. The judgment did not purport to determine whether the power would survive the death of the widow, or that the provision for the support of the children during their minority out of the *corpus* of the estate was a continuing provision, terminable only by the expiration of their several minorities. The judgment, therefore, is not *res adjudicata* in respect to these questions.

Opinion of the Court, per ANDREWS, J.

The intention of the testator, derived from the language of the will, was to give to his sons his real estate, and to his daughters his personal property, subject to the life estate of the widow, and to the support and education of the minor children out of the whole property during the widow's life, and that at her death the actual division should take place. The language of the will is express and unambiguous, viz., "after her (the widow's) death, all the real estate which may be found is to be divided equally among my sons, and all my personal property which shall be found then shall be equally divided among my daughters." The preceding clause is as follows: "I do hereby will in trust to my wife Elizabeth all my property, both personal and real, whatsoever and wheresoever, during her lifetime. In consideration of which it shall be her duty to care, protect and educate our children until they are of age." The trust is by its terms limited to the life of the widow. The gift of the life estate is the consideration for the duty imposed upon her to provide for and educate the children. But the duty ceased with their minority. After the children arrived at age the widow was no longer bound under the will to maintain them. And this we think is the purpose and intent expressed in the words "until they are of age," and that this clause of the will cannot be construed as indicating an intent to charge the whole estate with the support of the minor children after the widow's death.

It is inconsistent with the absolute gift in possession upon her death, contained in the succeeding clause. We are not at liberty to say that the testator designed that his minor children should be supported out of the estate after the death of the mother, if she should die before they reached their majority, when the clear meaning of the words used is opposed to this supposed intention. He may not have contemplated the contingency of the death of his widow before that time, but it is the duty of courts to give effect to the intention expressed in the will, whatever they may suppose the testator would have done if the particular event which has happened had been foreseen.

In the views we have taken it is immaterial to consider the question argued at bar, whether the will created a valid express trust, or a power in trust. Whichever it was, it was limited to the life of the widow and terminated at her death. The judgment in this case charged the land of the testator with a lien to the amount of $297.03, in favor of the plaintiff's intestate, for expenses incurred by him from 1861 to 1863 in maintaining the minor children of the testator. Lucas E. Brandow died in 1869, leaving a widow and eight minor children, four sons and four daughters, surviving him. Soon after his death his brother, Nicholas Brandow (the plaintiff's intestate), and the widow were appointed administrators of his estate, with the will annexed. In 1861 the widow died, leaving Nicholas Brandow the sole administrator. He was, under the statute, guardian in socage of the infant sons of his brother, and after the death of the widow he assumed to act as guardian of all his brother's children, and continued to act as guardian until another guardian was appointed in 1863. During this time he incurred the expenses which by the judgment are charged on the land devised by Lucas E. Brandow to his sons. They were incurred in making a home for and supporting all the children as one family. There is in the findings no separation of the items chargeable to each child, and there is no proof from which it can be ascertained what part of the expenses incurred was for the support of the sons and what part for the daughters. The judgment proceeds on the theory that the will charged the support of the minor children on the whole estate after, as before, the death of their mother. This construction of the will cannot be maintained. The land after the mother's death was not chargeable with the support of the daughters, and the judgment was therefore erroneous. We should be glad to find a legal ground for upholding the judgment of the Special Term. The plaintiff's intestate acted in good faith. The expenses he incurred were reasonable, and he acted, as is apparent, with a sincere desire to do what was best for his brother's children. But the defendants may insist upon their

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legal rights, and so insisting we have no alternative but to affirm the order of the General Term, and direct judgment absolute to be entered for the defendants upon the stipulation, without costs to either party in this court.

All concur.

Order affirmed and judgment accordingly.

IN THE MATTER OF THE APPLICATION OF THE NEW YORK CENTRAL RAILROAD COMPANY TO ACQUIRE LANDS OF ABNER A. ARMSTRONG.

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Under the general railroad act the question as to the necessity of the appropriation of lands for the use of a railroad corporation is a judicial one for the court to determine; and when controverted the facts must, in some form, be presented to the court to enable it to decide.

Where a railroad corporation makes application to acquire land in addition to that which it is entitled to take for its roadway, and objections are made by the owner, coupled with a denial of the special allegations of the petition respecting the purposes for which the land is required, the burden is upon the petitioner of adducing proof of the special circumstances alleged in support of the averment that it requires the land.

The provision of the general railroad act (§ 15, chap. 140, Laws of 1850, as amended by § 2, chap. 282, Laws of 1854), authorizing the land owner to disprove the allegations of the petition was intended to enable him to introduce proof upon his part to meet that offered by the petitioner, and to disprove allegations of the petition capable of being disproved; as to the special circumstances lying within the knowledge of the petitioner it is put to its proofs, if the owner show sufficient cause against the petition.

(Argued May 23, 1876; decided June 20, 1876.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing an order of Special Term appointing commissioners of appraisal herein.

The petition asked for the appointment of commissioners to appraise the compensation to be made to the several owners for a strip of land two rods wide along the south bounds of the company's land, in the town of Mentz, Cayuga county. It alleged the location and construction and opera-

tion of the petitioner's road, and then contained this averment: "That in addition to the land already owned by your petitioner and forming a part of its said railroad, your petitioner requires for its purposes of incorporation, for roadway, switches, turnouts, and for the purpose of running and operating its said railroad, and for the flow of water occasioned by railroad embankments or structures now in use or about to be constructed, and for the construction of the necessary additions to the roadway of your petitioner, and for the transaction of its business, the following described piece or parcel of land, to wit." Following which was a description of the land in question. At the time of the hearing, specified in the notice, Armstrong appeared and filed an affidavit, the material portions of which are as follows:

"That the petitioner has heretofore taken and laid its railroad through the farm owned by deponent in Mentz, the full width of six rods, adjoining the strip of land described in said petition, and is still the owner and occupant of the said six rods in width of land; and, as deponent is advised, the said six rods of land in width is all the petitioner has a right to acquire for its said road. And deponent deposes and says that the petitioner does not require nor need the land or premises described in said petition for the purposes of its incorporation, for roadways, switches, turnouts, or for the purpose of running or operating its said railroad, or for the flow of water occasioned by railroad embankments, or switches now in use or about to be constructed, or for the construction of the necessary additions to the roadway of said petitioner, or for the transaction of its business. That, as deponent is informed and advised, the six rods of land in width through deponent's premises, already owned and taken by petitioner, is all that is necessary for present or contemplated use of the said railroad for any purpose whatever."

The court ruled that the onus was upon Armstrong to disprove the facts alleged in the petition, to which said Armstrong duly excepted; and upon his refusal to adduce proof, an order was granted appointing commissioners.

Opinion of the Court, per RAPALLO, J.

Edward Harris for the appellant. The objections to the petition were not well taken, and were properly overruled. (*In re N. Y. C. and H. R. R. R. Co.* v. *Kip*, 46 N. Y., 552; *R. and S. R. R. Co.* v. *Davis*, 43 id., 187.) Upon the issue formed by the respondent's affidavit, the burden of proof was upon him. (Laws 1850, chap. 140, § 15; *R. and S. R. R. Co.* v. *Davis*, 43 N. Y., 143 *B. and S. L. R. R. Co.* v. *Reynolds*, 6 How. Pr., 96.)

H. V. Howland for the respondent. The petition did not state facts showing that the lands proposed to be taken were necessary for any legitimate use of the railroad company. (*People* v. *Smith*, 21 N. Y., 595, 598; *R. and S. R. R. Co.* v. *Davis*, 43 id., 144; *Cornell* v. *Barnes*, 7 Hill, 38, note; Laws of 1869, chap. 237; Laws of 1850, chap 140, § 15; *Adams* v. *S. and W. R. R. Co.*, 10 N. Y., 328.) The petitioner was bound to allege facts which made a case showing the court had jurisdiction under the act of 1869. (*Cornell* v. *Barnes*, 7 Hill, 38, note; 43 N. Y., 137.) The owner's affidavit denying the allegation of the petition was sufficient to prevent the granting of the motion. (Laws 1850, chap. 140, § 15; *Adams* v. *S. and W. R. R. Co.*, 10 N. Y., 328; *B. and S. L. R. R. Co.* v. *Reynolds*, 6 How. Pr., 9.)

RAPALLO, J. In the case of *Rensselaer and Saratoga Railroad Company* v. *Davis* (43 N. Y., 137) this court decided that, by the general railroad law, the legislature had not delegated to railroad corporations the power of determining what lands were necessary to be appropriated to their use for the purposes of their incorporation, but that, under that statute, it was for the court to determine, upon the application by a railroad company to acquire lands, the question of the necessity and extent of the appropriation, and that the land owner might contest this question. This necessity is, therefore, made a judicial question, and, when controverted, it is obvious that the facts must, in some form, be laid before the court to enable it to decide.

The statute prescribes the form of the petition to be presented to the court by the corporation seeking to acquire lands. It requires, among other things, that the petition shall contain a description of the land sought to be acquired, and must state that the land described is required for the purpose of constructing or operating the road. This is all that is required to be stated in the petition on the subject of the necessity. By the amendment of 1869, under which the present application is made, companies are empowered, after the construction of their roads, to acquire additional lands, if required for the purpose of operating the roads, or for any of the numerous purposes specified in the amendment, but the form of the petition is not changed.

The petition, in the present case, alleged that, in addition to the land already owned by the petitioner, it required the lands in controversy "for the purpose of its incorporation, for roadway, switches, turnouts, and for the purpose of running and operating its said railroad, and for the flow of water occasioned by railroad embankments or structures now in use or about to be constructed, and for the construction of the necessary additions to the roadway of the petitioner, and for the transaction of its business."

At the time appointed for the hearing of the petition, the respondent appeared and presented to the court his affidavit stating that he was the owner of the land sought to be taken and that the company had already taken a strip six rods in width through his farm, which was all the petitioner had the right to take. The affidavit then proceeds to deny that the petitioner required the land for any or either of the purposes alleged in the petition, and avers that the six rods already taken through the respondent's farm were all that the company required.

The court held that the onus was upon the respondent to show that the petitioner did not require the land, and decided that it would proceed to appoint commissioners unless the respondent offered evidence to show that the petitioner did not require the lands, and, thereupon, no proofs having been

offered, the court, against the objection of the respondent, appointed commissioners.

This ruling of the court was based upon its construction of section 15 of the general railroad law (3 Stat. at Large, 641), which provides that, on presenting the petition to the court with proof of service, any of the persons whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. That the court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petitioner, it shall make an order for the appointment of commissioners of appraisal.

It is claimed on the part of the company, and the court at Special Term held, that this section cast upon the respondent the burden of proving that the lands were not required for any of the purposes stated in the petition, and that in default of such proof the petitioner was entitled to the order.

The provision that the land owner may disprove the allegations of the petition gives color to this construction, but it seems to us contrary to the general intent of the act. The provisions securing notice and a right of being heard to all persons interested, and requiring the court to hear the proofs and allegations of the parties, show that the legislature intended that landowners should not be deprived of their property except by a judicial trial or investigation, and determination of the right claimed by the corporation, and that this was to be a substantial protection and not a mere matter of form. Some of the allegations which the law requires to be contained in the petition are so specific that they would be capable of being negatived by proof, but the principal allegation, viz., that the land is required for the purpose of constructing or operating the road, is one the negative of which could not be shown further than was done in this case. All that the land owner could show was the fact that the company had already laid out its roadway of the width of six rods through his farm. This was the extent to which, in the absence of

special circumstances, it was entitled to take land for a roadway (Gen. R. R. Act, § 28, subd. 4), and it appears, by the petition itself, that the company already had a roadway of this width. This objection, coupled with a denial of the special allegations of the petition respecting the purposes for which the respondent's land was required, was, we think, a sufficient showing of cause to have required that the petitioner adduce some proof of the special circumstances alleged in the petition in support of the averment that it required the land. These it was impossible for the respondent to negative by proof, and if judgment was to go against him on his failure to do so, the provisions designed for his protection would be totally ineffectual. For instance, one allegation is this, the land was required for the flow of water occasioned "by railroad embankments or structures now in use *or about to be constructed.*" How could the respondent know what structures were intended to be constructed, and how could he disprove this allegation? And yet, if he had failed to disprove it, although he had succeeded in disproving all the other allegations touching the necessity of taking these lands, he would, on the construction claimed, have failed in defeating the application, for he would have failed to show that the lands were not required, for some purpose. The same may be said of the general allegations that the land was required by the petitioner "for the purposes of its incorporation," and "for the transaction of its business." These are allegations, the negatives of which were not capable of proof by one not cognizant of the plans and intentions of the corporation. We think that it was incumbent upon the company to give proof in support of these allegations, and that the provision of the statute that the landowner may disprove the allegation was intended to enable him to introduce proofs on his part to meet those offered by the petitioners; and to disprove any allegations in the petition which were capable of being disproved; but that as to others it was sufficient if he showed sufficient cause against the petition to put the petitioner to proof of matters lying specially within its knowl-

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edge. When such cause was shown, it was incumbent upon the court to hear the proofs and allegations of the parties, and after having elicited the necessary facts to adjudge whether or not the lands were reasonably required for the operation of the road.

These views lead to an affirmance of the order of the General Term.

All concur; ALLEN, J., not sitting.

Order affirmed.

IN THE MATTER OF THE APPLICATION OF THE ROCHESTER WATER COMMISSIONERS TO ACQUIRE LANDS OF THE ROCHESTER WATER COMPANY.

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While a corporation cannot, under a power to take lands for a public use, take from another corporation having the like power lands held by the latter for a public use pursuant to its charter, yet an easement may be acquired, *in invitum*, in such lands when it may be enjoyed without detriment to the public or without interfering with the use to which the lands are devoted.

So, also, lands held by a corporation or public body, but not used for or necessary to a public purpose, may be taken as if held by an individual owner.

The R. W. Co. was incorporated for the purpose of supplying the city of R. with water. It owned lands on the margin of H. lake, and claimed to own, as riparian proprietor, the waters of said lake. The water commissioners of the city of R., under statutes authorizing the city to acquire by proceedings, *in invitum*, easements in lands for the purpose of procuring a water supply for the city, instituted such proceedings to acquire a right to dig a trench across certain specified lands of the R. W. Co. to the lake, and to lay a pipe therein for the purpose of carrying the water of the lake to the city. *Held*, that the rights of the respective parties to the water of the lake were not involved in the proceedings, nor did the petition or orders granted, in pursuance thereof, seek to confer upon the city any right to take or use the water, or to do any act to the detriment of a riparian proprietor; that all that could be, or was sought to be, acquired thereunder was an easement of laying pipes and conveying through them any water to which the city had a right; that, therefore, the granting of the petition was not an interference with the corporate rights and franchises of the R. W. Co., or with the use of the lands for the purposes of its organization.

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and in the estimate of damages made by such commissioners of appraisal, nothing shall be included for any corporate right, interest, privilege or franchise of the corporation owning the property to be taken, but the same shall be estimated precisely as if the property belonged to some private individual."

On March 3, 1875, another act was passed (chap. 39, Laws of 1872) amending the said original section 23 "so as to read as follows:" Following which was the original section entire, with the section 23, as contained in said chapter 33, Laws of 1875 added.

The petition herein set forth these various acts, and also alleged that the board of commissioners have commenced the construction of water-works to introduce water into the city from Hemlock lake; that for such purpose they desire to acquire the right or easement in certain of said lands so owned by the water company, adjoining Hemlock lake, which lands were specifically described in the petition, "of entering upon the lands so described and digging therein the necessary trench, and laying in such trench, when the same is dug, the necessary pipes, gates, stop-gates, blow-off pipes, etc.; to continue their line of conduit pipe and conduct water from Hemlock lake to the city of Rochester, together with the right, at all times, to enter upon said premises to maintain, repair and replace said pipe and its attachments; that they require and desire to secure the whole of the land so described for the storing of earth excavated, and material while digging said trench, laying said pipe and covering the same, when the surface of the ground will be restored to its present condition as nearly as may be."

The order, confirming the report of the commissioners appointed to award damages, recites "that the easement sought to be acquired by the petitioners, and for which such compensation was awarded, is as follows;" then follows a description of the easement in the language of the petition above quoted.

Geo. F. Comstock for the appellant. The city commissioners had no right, under the act of June 18, 1873, to appropriate and divert the water supply of the company, with or without

compensation. (*Bloodgood* v. *M. and H. R. R. R. Co.*, 18 Wend., 16; *Rogers* v. *Bradshaw*, 20 J. R., 735; *People* v. *Hayden*, 6 Hill, 361, 362; *Smith* v. *Helmer*, 7 Barb., 417.) The intention of an act to appropriate to public use lands already acquired by a private corporation for a public use under due authority, cannot be inferred but must be expressly and clearly stated in the act. (*Inhabitants of Springfield.* v. *Conn. R. R. Co.*, 4 Cush., 63; *In re Boston, etc., R. R. Co.*, 53 N. Y., 574; *W. R. Bridge Co.* v. *Dix*, 6 How. [U. S.], 507; *Dart. Col. Case*, 4 Wheat., 699; *Comm.* v. *Essex Co.*, 13 Gray, 252; *Miller* v. *State*, 15 Wall., 498.) The act of March 3, 1875, violated section 17, article 3 of the Constitution. (14 Ala., 9; 5 Ind., 327; 6 id., 31; 9 id., 154; 13 id., 31; 36 Ill., 385; 22 Cal., 434.)

W. F. Cogswell for the respondents. The petitioners had the right to acquire the easement in question over the appellant's lands. (*N. Y. C. and H. R. R. R. Co.* v. *M. G. L. Co.*, 5 Hun, 201.) The courts in interpreting a statute must be governed by the obvious intention, even if in conflict with the literal reading. (*W. Tpke. Co.* v. *McKean*, 6 Hill, 618; 1 Kent's Com., 460, 462 [m. p.]; *People ex rel. Furman* v. *Clute*, 50 N. Y., 451–456; Smith's Com. on Consts. and Stat., 698, 700; *State* v. *Buckley*, 2 Blackf., 249; *Peytoux* v. *Moseley*, 3 Mon. [Ky.], 77; *Nares* v. *Rowles*, 14 East, 510.) Upon the motion to confirm the appraisal no other question could be raised, except as to the regularity of the proceedings and report of the commissioner. (Laws 1850, chap. 140, § 17, p. 219; *N. Y. and E. R. Co.* v. *Smith*, 5 How. Pr., 117.)

ALLEN, J. There are two appeals by the Rochester Water Company in these proceedings; the one from an order appointing commissioners of appraisal, the other from an order confirming the appraisal by the commissioners of damages for lands taken by authority of law for a public use. The statutes under which the proceedings were taken did not

authorize the taking from the appellant any special corporate rights, privileges or franchises or any property or other thing essential to the exercise and enjoyment of the corporate powers and rights conferred by its charter. The power of the legislature of the State to deprive corporations of their franchises and take from them the property necessary to their enjoyment, in the exercise of the sovereign right of eminent domain, upon making compensation, is not disputed. But this must be done by special act of the legislature and under a power granted in express terms.

A corporation, either private or municipal, cannot, under a general power to take lands for a public use, take from another corporation having the like power lands or property held by it for a public purpose pursuant to its charter. (*In re Boston & Albany R. R. Co.*, 53 N. Y., 574.) But an easement may be acquired *in invitum*, by legislative authority, in lands held and occupied for a public use when such easement may be enjoyed without detriment to the public or interfering with the use to which the lands are devoted. (*New York Central and Hudson River Railroad Company* v. *Metropolitan Gas-light Company*,* recently decided by this court and not yet reported, affirming the judgment in 12 New York Supreme Court Reports, 201.) So, too, lands held by a corporation or by a public body, but not used for or necessary to a public purpose, but simply as a proprietor and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. The property rights of a corporation in lands not held in trust for a public use are no more sacred than those of individual proprietors. The law only protects from condemnation for public purposes lands actually held by authority of the sovereign power for or necessary to some public purpose or use. Lands held upon a special trust for a public use cannot be appropriated to another public use without special authority from the legislature. If, therefore, the object of these proceedings or the effect of the orders granted is to deprive the appellant of any of its corporate franchises and privileges

*63 N. Y., 326.

or take from it property or lands held in trust for a public use or necessary to the exercise of the powers and the enjoyment of the privileges conferred by the act of incorporation, the orders cannot be sustained. The orders conform to the petition and subject to an easement for the laying of water pipes by the respondents a narrow strip of land owned by the appellant upon the margin of a stream, the outlet of Hemlock lake. It is true that as well the petition as the orders state the object and purpose for which these pipes are to be laid, to wit, the taking of water from Hemlock lake and conveying the same to Rochester. But it is not assumed or adjudged that the respondents have any right to the waters of the lake or to take or use the same for any purpose, or that they have the right to a foot of land upon the lake and outlet or elsewhere, or that any rights will be acquired to take or use the water or occupy or impose a burden upon any premises other than the strip of land actually condemned; and the orders do not, in terms or by implication, confer upon the respondents any right to take or use the water of the lake or to take or use any land other than the narrow strip described, or to do any act to the detriment or injury of any riparian owner of lands upon the lake or outlet or claiming or having an interest or title to or right to use the waters of the lake or stream. The rights of the respective parties to these proceedings to the waters of the lake or the lands upon its shores or other franchises in respect to the same were not involved in the proceedings and could not be determined or adjudged. All that is said in respect to the lake, its waters and the use of its waters is merely descriptive and for the purpose of showing the propriety of granting this easement to complete the connection between Rochester and the lake upon the assumption that the respondents had acquired or might acquire the right to take the water and convey it to Rochester by the route described. The orders conclude no one and are not evidence against any one except in respect to the easement especially mentioned of laying the pipes across this narrow strip and conveying any water through them which the respondents should have a right to

take and bring to that point, to be conveyed thence to Rochester. Whatever rights the appellant has in the waters of the lake or the outlet, or whatever rights it has as a riparian owner of other property or of mills, they are not affected by the proceedings and orders now before us. If the orders are more extensive in their operation and effect than stated, they were not authorized by law and should be reversed. But, in the view we take of them, which is the same as that taken and urged by the counsel for the respondents, no other effect can be given to them than to subject this narrow strip of land to this particular easement, leaving every other question of property or corporate rights and damages that can arise between the parties to be determined hereafter, if any question shall arise.

The question next in order is, whether at the time these proceedings were instituted, in May, 1875, they were authorized by any statute then in force. The solution of this question depends upon the answer to another, to wit, whether section 23 of chapter 771 of the Laws of 1872, which authorized proceedings by the respondents to acquire title and other rights in and to lands, waters, etc., in the manner prescribed by the act authorizing the formation of railroad corporations and the acts amendatory thereof had or had not been repealed. The claim is that it was repealed by chapter 33 of the Laws of 1875. Section 1 of that act declares that section 23 of the act mentioned "is hereby amended so as to read as follows." Then follows a section as "section 23," entirely omitting every part of the original section and made up of entirely new matter, and providing merely for the acquisition of lands, easements, water rights, etc., owned by a corporation having the right of taking private property for public use. But the section, as incorporated, contemplates the continuance of the power to take lands and other rights upon an appraisal as prescribed by the statutes regulating the taking of lands by railroad corporations. It restricts the power of appointment of commissioners of appraisal, declares what rights shall be acquired in case commissioners shall be

appointed, and establishes the rule by which such commissioners of appraisal shall be governed in estimating the damages for lands and other rights belonging to corporations, and taken pursuant to the amendment. If section 23 of the Law of 1872 was intended to be, or was in fact, repealed and this substituted for it, these provisions would be meaningless, and the entire section substantially without practical effect. There would be no authority for a proceeding to take lands upon the appraisal of commissioners for the purposes named, or the appointment of commissioners of appraisal for any purpose. It is quite evident that the intent of the legislature was not to substitute the one section for the other, or to repeal the section as found in the act of 1872, but to add a new clause to it and to subject to its operation a new class of cases. The intent would have been carried out if the enactment by chapter 33 of 1875 referred to had amended the act of 1872 by adding a new clause containing the matter of the latter act to the section professedly amended, but, upon the theory of the appellant, really stricken out and repealed. The intent to continue the original section in force, with this new clause added, is made more apparent by reference to chapter 39 of the Laws of 1875, passed five days thereafter, which re-enacts section 23 of the act of 1872, with section 23 of chapter 33 of 1875 added to it. The amendment was accomplished in the same form by enacting that the original section should be "amended so as to read as follows," and then inserting the original section and the supplement as one section. The last act is challenged as violative of section 17, article 3, of the Constitution, so far as the provisions of the railroad acts regulating proceeding for the acquisition of lands for public use are made applicable, by a mere reference thereto, and without inserting the provisions in the act. If this objection is well taken, and we are not prepared to say that it is not, the validity of these proceedings depends upon the effect to be given to chapter 33 of the Laws of 1875. Ordinarily, and in the absence of any evidence of a legislative intent to the contrary, a substitution of one section for another

by an amendment in the form in which this amendment was accomplished, would work a repeal of the original section from the time of the amendment, and as affecting all cases thereafter arising. But when, from the language of the statute and of the amendment, a different intent is apparent, such effect will not be given to it; and where other acts of the legislature, passed at or about the same time, corroborate the evidence of intent, as gathered from the statutes under review, the duty of the courts is to give effect to the intent rather than to the literal terms of the act. The intent must not be conjectured, but must be apparent from all the statutes taken together, and consistent with the whole purpose and object as well of the original statute as of the amendment. This rule of interpretation is of frequent application, and is one of the most important and familiar canons of construction. It is not unfrequently necessary to resort to this rule of interpretation to prevent a miscarriage of the legislative intent and detriment to public interests. (*People* v. *Clute*, 50 N. Y., 451; *Smith* v. *The People*, 47 id., 330, and the authorities cited).

To hold that a repeal of this part of the act of 1872 was accomplished by the first act of 1875, would be to thwart the evident intent of the legislature, render the whole provision ineffectual for every purpose, and convict the legislature of enacting a law which was a nullity. The act should rather be construed so as to give it effect, especially as that can be done consistent with the purpose and object of the entire provision. The title of chapter 33.of the Laws of 1875, as "an act supplementary" to the act of 1872, is very persuasive evidence that it was not the intent to repeal any part of the act, or to substitute any other provisions in lieu of those contained in it, but, as its title declares, to supplement its provisions. The effect of the act was not, therefore, we conclude, to repeal section 23 of the act of 1872, but to add to it. It follows that these proceedings were properly instituted and the court had jurisdiction.

The objection is also taken, that these proceedings should

have been instituted in the name of the city of Rochester. The board of water commissioners were by the act authorized to make the application, and were the actors in the proceedings, and we see no reason to doubt that, as a board, they were authorized to take the proceedings upon their own motion, and as commissioners, without stating in terms that they acted for the city, or using the name of the corporation, although the title, when acquired, would be for the city of Rochester. The mere formal amendment of the petition and the other proceedings, stating them to be for and in behalf of the city, would be all that would be necessary to obviate this objection. But acting as they do under the statutes as a board of commissioners for the city of Rochester, and in the execution of a statutory trust, the law makes it a proceeding for and in behalf of the city, and all the property, rights and privileges that are acquired the law gives to the city and not to the commissioners. There is no valid objection to the form of the application or defect of parties to it.

The objection to the order confirming the appraisal is answered by the fact that the appraisers were not authorized to award any damages except for the strip of land actually taken, and that no other property and no other rights were involved in the proceedings. The appraisers, therefore, very properly refused to hear evidence as to any other injury, or to make any allowance for any diversion of water or the deterioration in value of any other property or privilege. These views lead to an affirmance of the orders without considering other and perhaps more serious questions that were raised and forcibly presented by the learned counsel for the appellant.

The orders must be affirmed.

All concur.

Orders affirmed.

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THE CENTRAL CITY SAVINGS BANK, Appellant, *v.* THOMAS R. WALKER et al., Respondents.

To establish a liability against a party as a partner for the acts of others, it must be made to appear that a copartnership was formed by express agreement, or that there was an authorization in advance and a consent to be bound by such acts as a partner, or a ratification of the acts after performance with full knowledge of all the circumstances, or some act by which an equitable estoppel has been created.

After the charter of a manufacturing corporation had expired by statutory limitation, its general agent appointed during the existence of the corporation continued to carry on the business and to contract debts; and for such a debt he gave a promissory note in the name of the corporation. In an action against the stockholders seeking to charge them as makers of the note, on the ground that there was an implied contract of copartnership between them, it appeared that defendants, six months after the expiration of the charter, received dividends as from the earnings of the corporation, but without notice that it was not so paid, and without knowledge of the expiration of the charter; also, that credit was not given to them as partners or individuals, but to the supposed corporation. *Held*, that upon the expiration of the charter, the title to the corporate property vested in the trustees then in office, in trust for the creditors and stockholders (1 R. S., 600, § 1); that the defendants being merely *cestuis que trust*, could not, without other evidence than proof of their interest, be charged as copartners, and that if they had received any part of the earnings of the business carried on after the corporation ceased to exist, this did not make them liable in an action at law upon the contracts made by the agent; nor did it amount to a ratification of his acts.

Also, *held*, that there was no legal distinction in respect to liability between a trustee and a simple stockholder where neither contracted the debt or authorized another to represent him in the transaction.

***National Bank* v. *Landon* (45 N. Y., 410) distinguished.**

(Argued June 7, 1876; decided June 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of defendants, entered upon an order nonsuiting plaintiff on trial at Circuit.

This action was brought against defendants, all of whom were stockholders and a portion trustees of the Utica Steam Woolen Company, to recover the amount of a promissory

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note executed by one Peter Clogher as agent of said company and in its name, it being alleged and claimed, in substance, that after the expiration of the company charter its trustees continued the business with the knowledge of the stockholders, and that they were liable as copartners. (Reported below, 5 Hun, 35.)

Two of the defendants, Walker and McQuade, appeared and answered.

The Utica Steam Woolen Company was a corporation organized February 27, 1846, under the manufacturing act of 1811 (chap. 67, Laws of 1811), by which act the term of the existence of corporations created under it is limited to twenty years. (§ 2.) One Clogher was appointed the agent and superintendent of the company in 1855, and managed all its business thereafter. After the expiration of the term so limited, *i. e.*, after February 27, 1866, the business was continued and conducted by Clogher the same as before in the name of the corporation, he being ignorant of the expiration of the charter, as were also the defendants. At the time of the expiration of the charter, defendant McQuade was secretary and one of the trustees of the corporation. The note was given for money borrowed after that time for the use of, and to carry on the business of, the company. In July, 1866, a dividend was declared and paid to the stockholders. The company became insolvent in 1869, its property was levied upon on execution, and proceedings in bankruptcy were commenced against it. It did not appear that any claim or suggestion was made until after the failure that the corporation had ceased to exist, and both defendants testified that they were entirely ignorant of that fact. Plaintiff was nonsuited on the trial, and exceptions were ordered to be heard at first instance at General Term.

J. R. Swan, Jr., for the appellant. The defendants were copartners. (Pars. on Part. [m. p.], 9; *Davis* v. *Grove*, 2 Robt., 134; *Bostwick* v. *Champion*, 11 Wend., 571; *Cumspton* v. *McNair*, 1 id., 457; *Reynolds* v. *Cleveland*, 4 Cow., 282;

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Mumford v. *Nicoll*, 20 J. R., 611; Story on Part., § 63; *D. C. Manuf Co.* v. *Davis*, 14 J. R., 238; *White* v. *S. and U. R. R. Co.*, 14 Barb., 559, 563; *Smith* v. *Strong*, 2 Hill, 241; *Bk. of Utica* v. *Smedes*, 3 Cow., 662; *Butts* v. *Mayor, etc.*, 4 Abb. Pr. [N. S.], 258; *Nat. U. Bk.* v. *Landon*, 45 N. Y., 410; *Fuller* v. *Rowe*, 57 id., 23; *Anthony* v. *Butler*, 13 Pet. [m. p.], 423; *Eastman* v. *Clark*, 53 N. H., 319, 339; 3 Kent's Com. [8th ed.], 22–32; *Fire Dep. of N. Y.* v. *Kip*, 10 Wend., 266; *M. E. Un. Ch.* v. *Pickett*, 19 N. Y., 482; *Welland C. Co.* v. *Hathaway*, 8 Wend., 480; Collyer on Part., § 385; *Thicknesse* v. *Brownlow*, 2 Cr. & J., 438; *Claverling* v. *Westley*, 3 P. W., 402; *Vassar* v. *Camp*, 14 Barb., 341, 342; Herman on Estoppel, § 3.) The company, after the decease of the corporation, did not become a corporation *de facto*. (19 N. Y., 119, 482; 21 id., 542; 26 id., 75; 26 Barb., 202; 42 id., 651; 41 id., 151; 29 id., 305; 5 How., 390; 15 Abb., 66.)

Francis Kernan for the respondents. Defendants, after February 27, 1866, were not copartners or liable as such. (Story on Part., §§ 64, 2, 3, 5, 32; *Irwin* v. *Conklin*, 36 Barb., 64; *Baldwin* v. *Burrows*, 47 N. Y., 199, 206; *Livingston* v. *Lynch*, 4 J. Ch., 573, 591–599; 3 Kent, 27 [m. p.]; *Hazard* v. *Hazard*, 1 Story, 371; *Chase* v. *Barrett*, 4 Paige, 148; *Porter* v. *McClure*, 15 Wend., 187; *Nat. Bk.* v. *Landon*, 45 N. Y., 410; *City of Utica* v. *Churchill*, 33 id., 237–239; *Queen* v. *Arnaud*, 9 Ad. & El. [N. S.], 806; *Mickles* v. *Roch. City Bk.*, 11 Paige, 119, 128; 2 R. S. [5th ed.], 597, §§ 9, 10.) The receipt of the dividend by defendant Walker was not a ratification of the action of Clogher or any one else as his agent in carrying on the business in the name of the company. (*Baldwin* v. *Burrows*, 47 N. Y., 199; *Dounce* v. *Parsons*, 45 id., 180; *Rowan* v. *Hyatt*, id., 138.) Plaintiff is estopped from asserting that the company is not a corporation, and from holding the stockholders responsible as partners for the debt. (*D. C. Manuf. Co.* v. *Davis*, 14 J. R., 239; *White* v. *Ross*, 15 Abb. Pr., 66; *M. E.*

Ch. v. *Pickett*, 19 N. Y., 482; *Eaton* v. *Aspinwall*, id., 119; *Lowry* v. *Inman*, 46 id., 125.)

ALLEN, J. The defendants are sought to be charged as makers of a promissory note, under the name of "The Utica Steam Woolen Company," a corporation whose charter had expired by its own limitation, and of which the defendants were stockholders. The corporation became such by filing a certificate pursuant to the act of 1811 relative to incorporations for manufacturing purposes, and the acts amendatory thereof, by the terms of which the corporate existence was limited to twenty years from the day of filing the certificate. (3 R. S. [Edmonds' ed.], 726.) The defendants served with process, became stockholders after the organization of the corporation, and were ignorant, in fact, of the day of filing the certificate and of the expiring of the charter. The plaintiff dealt with the corporation as such and not with the individual stockholders as copartners or associates in a joint stock association.

The defendants did not hold themselves out as copartners, neither did they by word or act assent to the making of the note in suit, or to the transaction of any business in the name of the corporation in their behalf or with knowledge that its legal existence had terminated. Some six months after the expiration of the charter a dividend was paid to the defendants, as from the earnings of the corporation, by the check of the treasurer, as annual dividends had been paid in former years, but without notice to them that it was not paid from the earnings of the corporation, or that the corporation had ceased to exist; and there was no proof that it was paid from the earnings of the business transacted in the name of the company after the lapse of the twenty years from its organization. The claim to recover is based solely on the fact that the agent of the corporation, without any authority other than that conferred by resolution of the trustees and under an appointment by them during the existence of the corporation, continued to carry on the business and contract debts, includ

ing that in controversy, in the name of the corporation, after the term for which it was created had expired.

The contention is that there was "an implied contract of copartnership" between the stockholders, by which they became liable as copartners to third persons. The property and property rights of the corporation were not owned by the individual stockholders, either during the existence of the corporation or after its dissolution. During the life of the corporation the body corporate was the legal owner, and upon the expiration of the charter the legal title vested in the trustees in office, at the time, in trust, for the creditors and stockholders. (1 R. S., 600, § 1; *Mickles* v. *The Rochester City Bank*, 11 Paige, 118.) The stockholders were merely *cestuis que trust*, entitled to share ratably in the property after the payment of debts. They did not assume to exercise any rights of ownership in the property. It is true that individuals may *quoad* third persons be charged as partners when they are not in fact partners *inter sese*, by voluntarily and knowingly sharing in the profits of the business or by holding themselves out as partners and thus inducing a credit on the faith of a partnership. (Story on Part., §§ 63, 64.) A liability may be created by an equitable estoppel, but when it is sought to be established upon the footing of a contract of partnership between the parties an agreement must be shown; and it will not be implied from the joint ownership of property, nor will the relation arise by operation of law. (Story on Part., §§ 2, 3, 32.) A partnership does not result from a joint ownership of property, but there must be an agreement, express or implied, to participate in the profits or losses of the business. (*Chase* v. *Barrett*, 4 Paige, 148; *Porter* v. *McClune*, 15 W. R., 187; *Livingston* v. *Lynch*, 4 J. C. R., 573.) The stockholders, who were but *cestuis que trust*, cannot, without other evidence than the proof of their interest, be held to have authorized each other as partners, to pledge the credit of the whole and to have empowered any one of the number to bind all in any matter within the ordinary course of the business of the defunct corporation. As *cestuis*

que trust having a common interest, each had dominion over his own share, but had no power over that of the others.

There was an entire absence of any intent of the parties to subject themselves to the risks and to the powers which are vested in each member of a partnership. By the Law Merchant, if the individual shareholders have received any part of the earnings of the business carried on by the trustees after the corporation ceased to exist, or have shared in the property of the corporation, they may, perhaps, be held to account in equity, to the extent they have profited; but this does not make them liable in an action at law upon the contracts of the trustees or of the corporation. (*Clavering* v. *Westley*, 3 P. Wms., 402.) Neither is there any evidence that the defendants ever constituted Clogher their agent to contract in their name or incur obligations in their behalf, or that they ever received the benefit of his acts so as to charge them with his obligations within the maxim, *qui sentit commodum sentire debet et onus*. The only act that is relied upon as an adoption of his acts is the receipt of the dividend in August, 1866. But this wants the essential fact that it was paid or received as the profits of a partnership business, as well as the element of knowledge of the acts now claimed to have been ratified, or that the dividend was not, in fact, from the earnings of the corporation, for and as which it was paid and received. A ratification can only be implied after knowledge of all the material facts is brought home to the party. A receipt of money as a part of the earnings of a corporation is no ratification of acts of business carried on outside of the corporation without knowledge of him who is sought to be charged with them that the moneys came from such business. (*Baldwin* v. *Burrows*, 47 N. Y., 199; *Dounce* v. *Myrick*, 45 id., 180; *Rowan* v. *Hyatt*, id., 138.) The case of *The National Bank of Watertown* v. *Landon* (45 N. Y., 410), is distinguishable from this by the fact that in the case quoted there was a special agreement between the stockholders under which the business was continued after the legal expiration of the charter, by which they made themselves partners in fact as well as

in law; and they were held liable as bound by the acts of one as a partner having power to bind all, and not by reason of any special agency in the individual by whom the debt was incurred. *Fuller* v. *Rowe* (57 N. Y., 23), relied upon by the plaintiff's counsel, is fatal to the plaintiffs, the court there expressly adjudging, that to make parties assuming to act in a corporate capacity, without a legal organization as a corporate body, liable as partners, it must be shown that the individuals sought to be charged were so acting at the time the contract sued upon was made, or that upon some consideration they agreed to become liable with the others as partners.

To constitute a partnership there must be the assent of the individuals to the creation of that relation between them; and in the cases relied upon by the counsel for the plaintiff there has been a partnership by express agreement, or an authorization in advance and a consent to be bound by the acts of others as partners, or by the particular act in question, or a ratification of the acts after they were performed with full knowledge of all the circumstances necessary to an intelligent avowal or disavowal of them, or some acts by which an equitable estoppel has been created — none of which circumstances exist in this case. (*Thicknesse* v. *Bromilow*, 2 C. & J., 425; *Anthony* v. *Butler*, 13 Peters, 423; *Eastman* v. *Clark*, 53 N. H., 276; *Vassar* v. *Camp*, 14 Barb., 341.)

The plaintiff failed to make a case against the defendants, and the questions of evidence made upon the trial are, therefore, immaterial. The liability of the two defendants served with process depends upon the same evidence; and there is no evidence against McQuade to distinguish his case from that of his codefendant; and it was not claimed upon the trial that either was liable if both were not.

The judgment must be affirmed.

All concur; ANDREWS, J., not sitting.

Judgment affirmed.

Upon decision of a subsequent motion for reargument, the following opinion was delivered:

Opinion of the Court, per ALLEN, J.

ALLEN, J. We have, in considering this motion, very carefully re-examined the case and reviewed the reasons assigned for the decision made by us that the judgment of the Supreme Court should be affirmed. The facts are undisputed. There can be but one conclusion from the evidence. There was no conflict in the testimony or doubtful inference to carry the case to the jury. The plaintiff conceded that the question was one of law and not of fact for the jury, by asking that a verdict be ordered for the plaintiff, and had the court agreed with him as to the legal principles upon which the case hinged, and the legal liabilities of the defendants resulting from the undisputed facts, a verdict would have been ordered as requested. But the evidence is uncontradicted that all the parties who were actors in the transaction under review, or who took part in the business of the cotton factory, supposed the corporation still existed and both borrower and lender of the money, to recover which this action is brought, supposed that the loan was to the corporation. The plaintiff did not deal with the defendants or the trustees or stockholders of the corporation as co-partners or as individuals, or give credit to them as such; neither did the defendants intend to become co-partners, or to become bound as such, and they did not hold themselves out as partners. Under these circumstances, we were of the opinion that no personal liability was incurred by the defendants, and for the reasons before assigned. Complaint is made that the counsel for the plaintiff is misrepresented, in the opinion, by the statement that it was not claimed that there was any distinction to be made between the defendants Walker and McQuade, in respect to their liability. The sentence is in these words: "There is no evidence against McQuade to distinguish his case from that of Walker, and it was not claimed, upon the trial, that either was liable if both were not." The latter clause of the sentence is the particular subject of the complaint, and is literally true and entitled to all the significance given it, as showing that no distinction could be claimed in this court, and it was not deemed necessary to prove that the point would not have availed had it been

properly and seasonably taken. The record is as follows: "Here the evidence closed. The plaintiff's counsel moved that the court direct a verdict in favor of the plaintiff against the defendants. The court refused to grant the motion, to which ruling and decision the plaintiff's counsel duly excepted. The defendants' counsel moved that the court order a nonsuit. The plaintiff requested to go to the jury, and the court declined to submit any fact to the jury, and ordered a nonsuit, to which ruling and decision the plaintiff's counsel excepted, and a nonsuit was ordered." We did not mistake the record and were not misled by the points and brief of the respondents, as is suggested. If the counsel for the plaintiff supposed that McQuade might be liable even if the court should rule in favor of Walker, he should have taken the position at Circuit and taken the ruling of the Circuit judge; and not having done so, but himself united both defendants in the same general request, he cannot, upon appeal, make the question that any distinction exists as to their respective liability. If he in fact took the point at the Circuit, it should have been made to appear in the exceptions and been spread out on the record, by which the appellate court must be governed. But if the point were in the case, we are of opinion that there is nothing in the evidence to distinguish between Walker and McQuade in respect to their legal liability. The circumstantial difference between the two in the position they occupied in relation to the corporation, both before and after its charter had expired by limitation of time, was not forgotten or overlooked; but we thought those circumstantial differences did not create a legal distinction between them in respect to their liability to the plaintiff. Neither contracted the debt in person or authorized any one to represent him individually in the transaction. The money was borrowed by the agent of the corporation, under a power conferred by the trustees while the charter was in life; and whether the party sought to be charged was nominally a trustee or only a stockholder, could not, upon the evidence in this case, be important. We find nothing to change or qualify in the former opinion. We had the points

and brief of the counsel for the plaintiff before us, and did not overlook the claim he made to hold McQuade, even if Walker should be adjudged not liable, but were of opinion that under his exceptions the point could not be taken, and that if it had been taken at the trial, and so properly before us, it was not tenable.

The motion must be denied, with ten dollars cost.

All concur.

Motion denied.

JOHN M. EASTERLY, Appellant and Respondent, *v.* WILLIAM C. BARBER, Appellant and Respondent.

In an action by an indorser of a promissory note, who has paid the same, against a prior indorser, it is competent for defendant to prove by parol that all the indorsers were accommodation indorsers, and by agreement they were, as between themselves, co-sureties.

In such an action it appeared that the holder of the note sued the note and collected it of the subsequent indorser, at the request of, and under an arrangement with, the prior indorser, who thereupon gave security. *Held*, that this did not estop the latter from setting up the agreement between the indorsers.

Evidence was given tending to show that the agreement was made in reference to a prior note which had been renewed from time to time until the note in question was given. The court charged, in substance, that if this was so, and if the last note was signed with the arrangement resting upon the minds of the indorsers, the jury would have no doubt in coming to the conclusion that the agreement attached to the last note. *Held*, no error.

There were four indorsers, between whom the agreement was made. Two were not parties. It was proved that they were insolvent, and plaintiff recovered judgment for half the note. *Held* (CHURCH, Ch. J., dissenting), that the action being one of law against one of the co-sureties, plaintiff was only entitled to recover defendant's proportion, to wit: one-fourth of the debt; that in order to make defendant liable for the one-half because of the insolvency of the others, an action in equity against all should have been brought; also, that the pleadings could not be changed to conform to the facts, as the proper parties were not before the court.

(Argued June 7, 1876; decided June 20, 1876.)

THERE were two appeals in this case, the one by plaintiff from an order of the General Term of the Supreme Court in

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the fourth judicial department denying motion for a new trial and directing judgment on a verdict, the other by defendant from the judgment entered upon such order.

The action was brought by plaintiff as third indorser of a promissory note to recover the amount thereof of the second indorser.

The note in question was made by the Stevenson Manufacturing Company, payable to the order of one Knight, who indorsed it. Defendant was second indorser, plaintiff third, and one MacDougall the fourth. Defendant alleged in his answer that the note was given and discounted for the benefit of the maker, in which company all the four indorsers were stockholders; that they indorsed for the accommodation of the company under an agreement that as between themselves they should be co-sureties, and share and contribute equally to the amount all or either should be obliged to pay thereon.

Upon a former trial plaintiff recovered a judgment for one-fourth the amount of the note. It appeared on such trial that the two other indorsers were insolvent. The General Term reversed the judgment and ordered a new trial on the ground that plaintiff was entitled to judgment for one-half the amount. (3 N. Y. S. C. [T. & C.], 421.)

Upon the second, parol evidence was received to prove the allegations of the answer, which was received under objection and exception. The evidence tended to show that the note in suit was a renewal of a former note; that the agreement was made in reference to the original note, which was renewed from time to time. The testimony was conflicting as to whether any thing was said in reference to the liability as co-sureties at the time of the indorsements of the note in suit.

Plaintiff was allowed to prove, under objection and exception, the insolvency of the other two indorsers, Knight and MacDougall. Evidence was given on the part of defendant tending to show that the bank which discounted the note brought suit thereon against plaintiff alone at defendant's request upon his giving security to indemnify the bank.

As to the agreement, the court charged, in substance, that

if the jury found that the agreement was made as claimed by defendant, plaintiff was entitled to judgment for one-half the amount of the note, to which defendant's counsel duly excepted.

The court also charged as follows: "If former notes have been given under this agreement, with the understanding that they were to stand with a joint, instead of a separate liability, and that note was carried along until it came to this one, and they signed this note with the arrangement and understanding resting upon their minds, you will have no doubt in coming to the conclusion that this agreement attaches to this last note;" to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

E. H. Avery for the plaintiff. The court erred in receiving parol evidence to change or vary the relations or liabilities of the parties upon the note in suit. (2 Abb. N. Y. Dig., 661, §§ 763–765; *Johnson* v. *McIntosh*, 31 Barb., 267; *Bk. of Albion* v. *Smith*, 27 id., 489; *Hall* v. *Newcomb*, 7 Hill, 419; *Moore* v. *Cross*, 19 N. Y., 227; *Meyer* v. *Hibsher*, 47 id., 265; *Spies* v. *Gilmore*, 1 Comst., 324; *Richards* v. *Waring*, 1 Keyes, 583; *Brown* v. *Wiley*, 20 How. [U. S.], 442; *Thompson* v. *Ketcham*, 8 J. R., 192; *Mont. Co. Bk.* v. *Albany City Bk.*, 8 Barb., 396; *Norton* v. *Coons*, 8 N. Y., 41; *Barry* v. *Ransom*, 12 id., 465; *Sisson* v. *Barrett*, 2 id., 406; *Cottrell* v. *Conklin*, 4 Duer, 50; *Bates* v. *Stanton*, 1 id., 87, 88.) The motion for a nonsuit was properly denied. (Code, §§ 69, 140, 142, 147, 148; *Phillips* v. *Gorham*, 17 N. Y., 274, 275.) Plaintiff was entitled to recover of defendant one-half the sum paid on the note. (1 Story's Eq. Jur., §§ 495, 496; *Bradley* v. *Burwell*, 3 Den., 66.)

Francis Kernan for the defendant. The parol agreement between the co-sureties was valid and obligatory between them. (*Barry* v. *Ransom*, 12 N. Y., 462, 464–467; *Phillips* v. *Preston*, 5 How. [U. S.], 278, 292; *Blake* v. *Cole*, 22 Pick., 97; Chitty on Con. [6th Am. from 3d Lond. ed.], 598, note *i*.) In an action by a surety against one of several co-sureties, he can

each *only the aliquot* proportion of the amount paid, for which all were bound, notwithstanding one or more of the sureties is insolvent. (Chitty on Con. [6th Am. from 3d Lond. ed.], 597, 598; Story's Eq. Jur., § 496; *Braman* v. *Blanchard*, 4 Wend., 432, 435; *Brown* v. *Lee*, 6 B. & C., 689; *Cornell* v. *Edwards*, 2 B. & P., 268.) Plaintiff could only recover one-quarter of the amount paid. (*Reubens* v. *Jewell*, 13 N. Y., 488, 493; *Hubbell* v. *Sibley*, 50 id., 468, 472.) The present action is one which, by the Code, must be tried by a jury. (Code, § 253; 13 N. Y., 498.)

MILLER, J. The first question presented upon these appeals is, whether it is competent in an action by one indorser against a prior indorser for the defendant to prove by parol an agreement between all the indorsers that they were, as between themselves, co-sureties where they are accommodation indorsers. In *Barry* v. *Ransom* (12 N. Y., 462) it was held that an agreement made between parties prior to or cotemporaneously with their executing a written obligation as sureties, by which one promises to indemnify the other from loss, does not contradict or vary the terms or legal effect of the written obligation, and it may be proved by parol evidence. It was said by DENIO, J., in the opinion, that an agreement among the sureties, arranging their eventual liabilities among themselves in a manner different from what the law would prescribe, in the absence of an express agreement, would not contradict any of the terms of the bond. It was also held, that the engagement among themselves had no necessary place in the instrument between them and the other contracting parties. The case cited referred to a joint and several bond, where the obligors were equally liable upon its face. No reason exists, however, why the same principle is not applicable to notes and bills of exchange. The terms of the contract contained in instruments of this character, which are within its scope to define and regulate, cannot be changed by parol; but the understanding between the indorsers is a distinct and separate subject, an outside matter, which may be properly

proved independent of and without any regard to the instrument itself. This rule is distinctly established in reference to joint makers of promissory notes; and although the previous decisions had been somewhat uncertain it has been recently determined by the decision of this court that where a person signed, as surety, a joint and several promissory note, and it did not appear by the instrument itself that such relation existed, he might prove such fact by parol, and that such proof did not tend to alter the terms of the contract. (*Hubbard* v. *Gurney*.*) It is not apparent that any such difference exists between the two classes of cases which prevents the application of the same principle to both of them.

An attempted distinction is sought to be maintained because the relation of indorsers to each other are fixed by law; while the relations and obligations of sureties and obligors are not fixed. As between the principal and the sureties they are fixed quite as much as between indorsers, and can only be settled as between sureties where the contract does not show the fact by parol proof of the same. In support of the same views is the case of *Philips* v. *Preston* (5 How. [U. S.], 278, 292), where the doctrine is laid down that proof of a collateral contract, by parol, may be given to show the liability of indorsers as between themselves. (See, also, *McDonald* v. *Magruder*, 3 Peters, 470; *Aiken* v. *Barkly*, 2 Speers, 747; *Edelen* v. *White*, 6 Bush. [Ky.], 408; *Davis* v. *Morgan*, 64 N. C., 570.) The indorsements upon bills of exchange or promissory notes rest upon the theory that the liability of indorsers to each other is regulated by the position of their names, and that the paper is transferred from the one to the others by indorsement. But this rule has no practical application to accommodation indorsers, where neither of them has owned the paper and no such transfer has been made. It is easy to see that the application of the rule contended for, in many cases, would work the most serious injustice. Suppose a person sign as accommodation maker of a promissory note, and the payee for whose benefit it is made indorses it and pays the

* 64 N. Y., 457.

note, and afterwards sues the maker to recover back the money, would it be seriously contended that proof could not be given to show that he was merely an accommodation maker? Clearly not; and yet such evidence would contradict the written instrument quite as much as it would to prove an agreement between indorsers in regard to their liability as between each other. Cases frequently arise where it is competent to prove that the indorsement is made for the accommodation of the maker; and a drawee may show, after acceptance, that he has no funds (3 N. Y., 423) in his hands, and that he was merely an accommodation acceptor. (*Griffith* v. *Reed*, 21 Wend., 502.) The cases to which we have been referred by the plaintiff's counsel do not, we think, sustain the position contended for; that parol proof cannot be given to show an arrangement between accommodation indorsers different from that which appears by the legal effect of the instrument, and a particular examination of them is not required. The uniform practice in this State has been in conformity to the views expressed in reference to proof of this character, and it would be establishing a new rule at this time to hold that such testimony was incompetent. There was, therefore, no error committed by the judge in the admission of the evidence to which objection was taken.

There is no force in the objection made by the plaintiff's counsel that the evidence failed to establish the agreement alleged in the answer to have been made in reference to the note in suit. It was purely a question of fact what the agreement actually made was. No request was made to take the case from the jury, and sufficient was shown to submit the question raised to their consideration. There is no ground for claiming that the defendant was estopped from setting up the verbal agreement alleged to have been made as a defence. The arrangement of the defendant with the bank for the prosecution of the note and the collection of the same of the plaintiff, and the security given thereupon do not contain the elements of an estoppel. The defendant was not the actual party in the suit, and the most which can be said in regard to

it is, that the defendant preferred to have it collected of Easterly instead of himself, and to compel Easterly to sue him for the proportion which he was lawfully liable to pay. There was no assumption in this, we think, that estops the defendant.

We are also of the opinion that there was no error in that portion of the charge wherein the court instructed the jury that if former notes had been given under the agreement, with the understanding that they were to stand with a joint instead of a separate liability, and they were carried along until they came to this one, which, if it was signed with the arrangement and understanding resting upon their minds, they would have no doubt in coming to the conclusion that this agreement attaches to the last note. This was a necessary result of the facts proved and clearly right. The requests to charge upon this branch of the case in this connection were properly refused, as the propositions presented were sufficiently covered in the charge which had already been made. The discussion had leads to the conclusion that sufficient grounds are presented on the plaintiff's appeal for a reversal or modification of the judgment.

Other questions arise upon the defendant's appeal, which should be considered. It is claimed that an action at law by a surety for contribution must be against each of the sureties separately for his proportion, and that no more can be recovered, even where one or more are insolvent. In the latter case, the action must be in equity against all the co-sureties for contributions, and, upon proof of the insolvency of one or more of the sureties, the payment of the amount will be adjudged among the solvent parties in due proportion. The principle stated is fully sustained by the authorities. It is thus stated, in Parsons on Contracts (vol. 1, page 34): "At law, a surety can recover from his co-surety an aliquot part, calculated upon the whole number, without reference to the insolvency of others of the co-sureties; but in equity it is otherwise." (See, also, *Browne* v. *Lee*, 6 Barn. & Cress., 689; 13 Eng. C. L., 394; *Cowell* v. *Edwards*, 2 B. & Pull., 268; *Beaman* v. *Blanchard*, 4 Wend., 432, 435; Story's Eq. Juris.,

§ 496; 1 Chitty on Con. [5th Am. ed.], 597, 598; Willard's Eq. Juris., 108.) There seems to be a propriety in the rule that where sureties are called upon to contribute, and some of them are insolvent, that all the parties should be brought into court and a decree made upon equitable principles in reference to the alleged insolvency. There should be a remedy decreed against the insolvent parties, which may be enforced if they become afterwards able to pay, and this can only be done in a court of equity and when they are parties to the action. The action here was not of this character; nor were all the proper parties before the court. It was clearly an action at law, and in that point of view, as we have seen, the plaintiff could only recover for one-fourth of the debt for which all the sureties were liable. The distinction between the two classes of actions is recognized by the decisions.

The remedies, the parties and course of procedure are each different. In the one, a jury trial is a matter of right; while in the other the trial is by the court. The costs are also in the discretion of the court. (Code, §§ 253, 306; 13 N. Y. [*supra*], 498.) As the judgment could not require each of the parties to pay his aliquot share and furnish a remedy over against those who were insolvent and the rights of the parties be finally determined and fixed, it was under the facts proven clearly erroneous. Although in many cases under the Code the pleadings, if necessary, may be made to conform to the facts, and the case disposed of upon the merits, the defects here are so radical as to strike at the very foundation of the action, and cannot thus be remedied. Besides, the proper parties are not before us, and cannot be brought in, except on motion in the court below. As the claim was alleged in the complaint, there was no such defect of parties apparent as required the defendant to take the objection by demurrer or answer.

It follows that the judgment must be affirmed upon the plaintiff's appeal, with costs of appeal to be paid by the plaintiff upon the final termination of the action, if the defendant succeeds; and if the plaintiff succeeds, to be set off against the

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plaintiff's costs. And the judgment must be reversed upon the defendant's appeal, with costs of the appeal in this court, and costs in the Supreme Court to abide the event.

All concur, except CHURCH, Ch. J., dissenting.

Ordered accordingly.

GEORGE M. SHADER, Administrator, etc., Appellant, *v.* THE RAILWAY PASSENGER ASSURANCE COMPANY, Respondent.

An accidental insurance policy contained a clause providing that no claim should be made thereunder "where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drink." The insured was killed by a pistol shot. In an action upon the policy, *held*, that if the death of the insured occurred while he was under the influence of intoxicating drink, this alone avoided the policy without regard to the question whether that condition was the natural and reasonable cause of the death, or in any manner contributed thereto; and, also, that such a provision was proper and reasonable.

Bradley v. *Mutual Benefit Life Insurance Company* (45 N. Y., 422) and *Welts* v. *Connecticut Mutual Life Insurance Company* (46 id., 34) distinguished.

(Argued June 9, 1876; decided June 20, 1876.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 3 Hun, 424.)

This action was upon an accidental insurance policy issued by defendant to plaintiff's intestate, Wesley E. Shader.

The insured was shot and killed while dining with a friend. The evidence tended to show that he was at the time under the influence of intoxicating liquor, of which he had been drinking freely.

The judge charged the jury, among other things, as follows: "The question is not simply whether he was under the influence of intoxicating liquors at the time, but it is whether the injury occurred in consequence of that. The question is, was

the injury the natural and reasonable result of his being in that condition? * * * It is not enough to find that he was under the influence of intoxicating drinks at the time. You are to find that the injury he received was the natural and proximate result of that condition. You are to see the connecting link between the injury and the condition he was in." To which defendant's counsel duly excepted.

Said counsel asked the court to charge, among other things, that "if, at the time Shader was shot, he was under the influence of intoxicating drinks, the plaintiff could not recover, and this is so, whether the influence of the liquor occasioned the discharge of the pistol or not." The court refused so to charge, and defendant's counsel duly excepted.

J. B. Adam for the appellant. Defendant was liable, if the injury to plaintiff's intestate was not the natural cause and reasonable result of his being intoxicated, notwithstanding the provisions of the policy. (*Bradley* v. *Mut. Benefit Ins. Co.*, 45 N. Y., 422; *Welts* v. *Conn. Mut. L. Ins. Co.*, 48 id., 34.)

Geo. F. Danforth for the respondent. If the deceased was intoxicated when the injury occurred, no question can be made whether non-compliance with the condition of the policy affected the risk, or whether this condition was reasonable or not. (*Savage* v. *How. Ins. Co.*, 52 N. Y., 50; *Southcombe* v. *Merriman*, 1 C. & M., 286.)

MILLER, J. The question arising directly upon this appeal relates to the charge of the judge and to his refusal to charge as requested by the counsel for the defendant. The policy provided that: "No claim shall be made under this policy where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks." The judge in his charge to the jury stated that the question was not simply whether the deceased was under the influence of intoxicating liquors at the time, but it was whether the injury occurred in conse-

quence of that, and it was the natural and reasonable result of his being in that condition; and he charged, in substance, that if the injury happened in consequence of his being under the influence of intoxicating liquors, the plaintiff could not recover. The court was requested to charge that, if at the time Shader was shot, he was under the influence of intoxicating drinks, the plaintiff could not recover; and this was so whether the influence of the liquor occasioned the discharge of the pistol or not. This was declined. Exceptions were duly taken to the portion of the charge made and the refusal to charge.

The first inquiry which presents itself to our consideration is the construction to be placed upon the proviso referred to. An exact and accurate interpretation of the language employed manifestly conveys the idea that it was intended to comprehend all cases where injury or death might happen while the assured was under the influence of intoxicating drinks, as well as such as might occur by reason of the use thereof. As to the first class of cases stated in the proviso, the words imply that it is not required that the use of intoxicating drinks should be the moving cause in producing the injury or death, and quite sufficient to avoid a liability that the person in whose favor the policy was issued was under the influence of such stimulants, without regard to the effect which might result from such a condition. The limitation in the policy related to the *condition* of the insured, not to the *cause* which might produce his death. And here lies the distinction which is to be drawn in its construction, for, by any other or different interpretation the words used would not only be unnecessary but meaningless and without point. As the policy was rendered void if the assured was injured or killed while under the influence of intoxicating drinks, it was not essential, to work a forfeiture, that injury or death should occur in consequence of the use of the same.

As to the second class of cases the policy was designed to provide for the possible contingency which might arise after the influence of intoxicating liquors had ceased to operate

directly, and the subsequent effects produced thereby in consequence of the previous use thereof. The intention, evidently, was to limit the liability of the company by the contract with the assured, and not to incur any responsibility when the injury occurred while the assured was directly under the influence, or where the result was remotely produced by intoxicating drinks. Accidental policies are issued principally to travelers or persons exposed to unusual peril and danger, and the risk in such cases being extremely hazardous it is by no means unreasonable that the insurer should require that the assured should be under no exciting influence which may affect his self-possession or judgment, or seriously interfere with the free, full and deliberate exercise of his faculties in protecting himself from accident or harm. It follows that the proposition laid down by the judge was erroneous; and he also erred in refusing to charge as requested.

We are referred to the case of *Bradley* v. *The Mutual Benefit Life Insurance Company* (45 N.Y., 422), as an authority adverse to the views expressed; but we think it does not support the doctrine contended for, and is not in point. The policy in that case contained a proviso that in case the insured should die "in the known violation of any law of the State he is permitted to visit, the policy shall be void." It was held, that to justify the court in taking from the jury the question whether the deceased came to his death in a manner covered by this clause, that whatever be the nature of the violation of law claimed as avoiding the policy, the death must clearly appear to have been the natural and legitimate consequence of such violation. It was evident from the proviso contained in the policy in the case cited, that a relation must exist between the violation of law and the cause of the death, for any other construction would be unwarranted and clearly beyond the meaning of the policy. It is also manifest from the phraseology employed, that no liability was incurred if the assured was engaged in the violation of law unless such violation had some connection with the cause of his death. If the provision had been that if the assured should die *while*

engaged in the violation of any law, there would be some ground for claiming that there was an analogy between the two cases; although, even then, it might be questioned whether such a condition was applicable to all cases of a violation of law. In the case at bar the proviso is absolute, direct and unequivocal, and the circumstances are entirely different; besides, there are strong and unanswerable reasons which do not apply in the case cited, for the insertion of such a clause in a policy of this kind, for the purpose of protecting the company from the reckless and improvident acts and conduct of the insured, which may have been induced by the improper use of intoxicating drinks. The decision in the case cited was made in view of the circumstances presented and with reference to the language employed, and upon no fair interpretation can it be considered as controlling in the case at bar. Nor does the case of *Welts* v. *The Connecticut Mutual Life Insurance Company* (48 N. Y., 34) affect the case now considered. It was properly held in that case that an employment by military authority in building a railroad bridge was not within the prohibition of the policy, forfeiting the same, if the assured should enter into any military or naval service without the consent of the company. This principle can have no application where the prohibition is in express terms against an act or conduct which may directly tend to produce death or an injury and which, beyond question, seriously affects and increases the risk of the insurer.

As the judge erred, upon the trial, the judgment was properly reversed and a new trial granted.

The order must be affirmed and judgment absolute ordered for the defendant, with costs.

All concur.

Order affirmed, and judgment accordingly.

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RAMON M. ESTEVEZ et al., Appellants, v. EMILY E. PURDY et al., Respondents.

Where a lender has received a security providing for the payment of the precise amount loaned by him with lawful interest, the fact that his agent, without his authority, knowledge or participation, has extorted from the borrower a sum of money upon the false pretence that a portion thereof was a bonus for his principal does not taint the security with usury.

The employment of an agent to effect a loan does not impliedly or apparently authorize him to violate law or do an illegal act.

The fact that an action upon the security is commenced by the principal after knowledge upon his part of the exaction of the agent is not a ratification thereof; the security coming to him unaffected by usury, he has the right to enforce it.

After payment of a portion of the amount due upon a bond secured by mortgage, the obligors applied to the agent of the obligees for a reloan of the sum paid upon the same securities. This the obligees agreed to. The agent exacted of the obligors $225 professedly for the obligees, who did not receive any portion of it and knew nothing of the representation. One of the obligees was informed by the obligors before the loan of the terms their agent exacted, to which he replied that it was too much for the agent's services. The obligees loaned the full amount, and it did not appear that they knew how much was finally paid or agreed to be paid to the agent. *Held*, that the evidence rebutted any inference that the obligees connived at, consented to, or authorized the charge, and that, therefore, there was no usury.

Algur v. *Gardner* (54 N. Y., 360) distinguished.

Estevez v. *Purdy* (6 Hun, 46) reversed.

(Argued June 12, 1876; decided June 20, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term. (Reported below, 6 Hun, 46.)

This action was brought for the foreclosure of a bond and mortgage for the sum of $5,000, executed by defendants, Emily E. and Ambrose H. Purdy, to plaintiffs.

The court found, in substance, that Mrs. Purdy made application to a Mr. Butcher, an agent of plaintiffs, for the loan, who exacted and retained out of the $5,000 loaned the sum of $500, he representing that $150 was for his services in search-

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ing the title, etc., and the balance was to go to plaintiffs as a bonus; that when the bond became due $2,500 of principal and all interest accrued were paid thereon, and payment of the remaining $2,500 of principal was extended for three months upon payment by Mrs. Purdy of sixty-two dollars and fifty cents, which was demanded by Mr. Butcher and paid by Mrs. Purdy as a bonus for such extension; that at or about the expiration of said period of three months an arrangement was made with Mrs. Purdy, by which the plaintiffs loaned her $2,500 more, and it was agreed between them and her that the $5,000 in which she was then so indebted to them should become payable in nine months from that time and not before. Mrs. Purdy at that time also verbally agreed with the plaintiffs that upon such additional loan said bond and mortgage should stand as originally for $5,000 and interest, and upon receipt of said last $2,500 made and delivered to the plaintiffs a certificate in writing, signed by her, to the effect that $5,000 was unpaid on the bond; that at the time of the said last loan and extension Mr. Butcher exacted and received from Mrs. Purdy $225 as a condition thereof and bonus therefor, which, he stated to the agent of Mrs. Purdy, was all to go to the plaintiffs for their exclusive benefit, and he afterwards told said agent that he had paid all of it to them; that plaintiffs were aware that their agent exacted such sum as a condition of the reloan, and that defendants agreed to pay it; that before the commencement of this action the plaintiffs had notice and were aware of the fact that Mrs. Purdy asserted the defence of usury set up by her in this action by reason of the aforesaid payments of bonus, and knew of the claim made by Mr. Butcher for the last sum before it was paid; that none of the money so paid for bonus was ever received by the plaintiffs themselves or was applied to their benefit, and that they never authorized Mr. Butcher to take or agree for more than seven per cent interest per annum for the loan, or forbearance of said money, or of any of it. As conclusions of law, that the plaintiffs were entitled to judgment of foreclosure and sale for the amount of the bond and mortgage, with interest.

Plaintiffs, in their evidence on the trial, denied all knowledge of their agent having charged a bonus, and one of them testified that when informed, prior to the second loan, of the exaction of their agent, and the amount thereof, he stated that it was too much for the agent to charge for his services. No evidence was given showing that plaintiffs knew the amount finally paid or agreed to be paid.

Samuel Hand for the appellants. Where an agent for loaning money takes a bonus beyond legal interest for himself without the knowledge, authority or consent of his principal, it does not affect with usury the loan of the principal. (*Condit* v. *Baldwin*, 21 N. Y., 219; *Bell* v. *Day*, 32 id., 165; *Farmers' Co.* v. *Clowes*, 3 id., 470; *Chatham Bk.* v. *Betts*, 37 id., 356; 9 Bosw., 552; *Crane* v. *Hubbell*, 7 Paige, 413; *Elmer* v. *Oakley*, 3 Lans., 34.)

Moses Ely for the respondents. The bonus paid to plaintiff's agent rendered the loan usurious. (*Bell* v. *Day*, 32 N. Y., 179; *Bennett* v. *Judson*, 21 id., 238; *Condit* v. *Baldwin*, 21 Barb., 187.)

EARL, J. The question to be determined by us is whether the plaintiffs' securities, which provide for the payment to them of the precise amount loaned by them, with lawful interest, are tainted with usury and void because their agent, in making the loan, without their knowledge or consent, extorted from the defendants the sum of $500, upon the false pretence that a portion thereof was for his services and the balance was a bonus for his principals. This question must, upon authority, be determined in favor of the plaintiffs.

In *Condit* v. *Baldwin* (21 N. Y., 219) the plaintiff placed in the hands of Williams the sum of $400 to invest for her at lawful interest; he loaned it to the defendants upon their note for the amount with lawful interest and exacted for himself a bonus of twenty-five dollars from the borrowers, and it was held that the note was not affected with usury. The

law of the case, as stated in the head-note, is, that where an agent intrusted with money to invest at legal interest exacted a bonus for himself as the condition of making a loan, without the knowledge or consent of his principal, this does not constitute usury in the principal nor affect the security in his hands. That case was decided by a divided court, but it was followed on the principle of *stare decisis* in *Bell* v. *Day* (32 N. Y., 165). In the latter case, Glover was the general agent of the lender, and exacted for himself a bonus of fifty dollars, without the knowledge or authority of the lender, and it was held that the contract of loan was not by the extortion of the agent rendered usurious. These decisions are based upon the principle that the lender did not, either expressly, impliedly or apparently, authorize the agent to do an illegal act or to violate the law; and hence, that he was not affected by the wrongful act of the agent in extorting from the borrower a bonus for himself, so long as the lender did not authorize, consent to or participate in the extortion and was seeking to enforce a security for the precise amount loaned, with lawful interest. In each case there was but one agreement, to pay the amount borrowed to the lender, with lawful interest, and to pay the bonus to the agent.

It is sought to distinguish this case from those because here the agent professed to take a bonus for the lenders. It must be conceded that if he had professed to take the bonus for himself this case would have been precisely like those. But it can make no difference in principle that he professed to take it for the lenders, so long as he had no express, implied, or apparent authority to do so. The lenders have neither taken, assented to, nor participated in the usury. In *Lee* v. *Chadsey* (3 Abb. Ct. of Ap. Dec., 43), Boyer loaned money to Chadsey and charged certain commissions for making the loan. He loaned the money ostensibly for himself, but really for Leeds, and it was held that a commission, in excess of lawful interest, exacted by an agent for his own benefit, without the knowledge of his principal, does not, necessarily make the loan usurious, even though the borrower believed the agent was

dealing with him as principal. J. C. SMITH, J., said: "There is nothing in the case to estop Leeds from questioning the truth of the representations made by Boyer to Chadsey, and, upon the authority of the decisions of this court in *Condit* v. *Baldwin* and *Bell* v. *Day*, it must be held, that although Chadsey believed he was dealing with Boyer, and paid him a bonus in excess of the legal rate of interest as a condition of the loan, yet, if in fact Leeds loaned the money to Chadsey the note was not usurious if Leeds did not take usurious interest himself or know of its being taken." That case settles the point that the principle of the two former cases is not confined to the case where the agent of the lender professedly exacts the bonus for himself.

It is further claimed that this case is distinguishable from the cases cited because, here, the plaintiffs knew before they commenced this action, of the exactions by their agent, and hence that they ratified, by commencing this action, the acts of their agent, who professed to act for them in extorting the bonus. But the cases are not distinguishable in this. They parted with their money and took security for the precise amount loaned, with lawful interest, without any knowledge of the bonus, and their security comes to them untainted by usury, according to the cases above cited. Hence they had the right to enforce them, and their attempt to do so, certainly, could not render them void because of their subsequent knowledge of the bonus exacted.

At the end of a year from the making the loan, the defendants paid thereon the sum of $2,500. A short time thereafter the defendants applied, through Butcher, to have the $2,500 reloaned to them upon the same security, and it was agreed between them and the plaintiffs that the money should be thus reloaned and that the plaintiffs should then hold the mortgage again as a security for the full $5,000. Upon this reloan Butcher exacted $225, professedly for the plaintiffs; but it was really for himself, and the plaintiffs did not share in it or know any thing about it. If there was nothing more, this exaction would be covered by what has already been said

But it is claimed that the plaintiffs knew of this exaction before they parted with the money, and the defendants gave evidence tending to show that they did know of it, and the judge found that they did. As the judge decided the case in favor of the plaintiffs, we may assume that he took the version as to their knowledge testified to by them and most favorable to them; and they denied all knowledge, except one of them testified, that when informed of the exaction, he stated that it was too much for the services of Butcher. From their evidence it appears that they did not know that Butcher charged a bonus, either for them or himself, but simply that he charged a sum for his services which they considered too much. It does not appear that they knew before they reloaned the money how much was finally paid or agreed to be paid to Butcher. All inference that they connived at, consented to, or authorized the charge in any way was rebutted by the evidence, and hence there was no usury affecting the plaintiffs in the transaction.

The case of *Algur* v. *Gardner* (54 N. Y., 360) is not in conflict with the authorities above cited. In that case there was evidence from which the jury might have inferred that the loan was made by the agent, at a usurious rate of interest, with the consent of the principal, and the judgment was reversed for an erroneous charge of the judge affecting the main issue in the case.

It is not important to consider whether the construction of the usury laws of this State, given in the cases above cited is the wisest or soundest, or whether there is not much that can be said against it. It has been followed in many cases, and has, doubtless, furnished a rule of action in many transactions between lenders and borrowers, and these authorities must be respected upon the principle of *stare decisis*.

The order of the General Term must be reversed and the judgment of the Special Term affirmed, with costs.

All concur except CHURCH, Ch. J., not voting; ANDREWS, J., absent.

Order reversed, and judgment accordingly.

Statement of case.

HENRY G. PRESTON, Appellant, v. THOMAS B. MORROW et al., Respondents.

CARRIE G. BARNES, Respondent, v. HENRY G. PRESTON, Impleaded, etc., Appellant.

A party to an action which is not referable without consent of the parties, by consenting to refer to a particular referee, does not waive his right to a trial by the court or a jury if for any reason the reference agreed upon falls through.

Upon the death, removal or refusal to act of the referee, the action is again in court for trial as if no reference had been consented to; and the court has not the right to order a new reference without consent of the parties.

(Argued June 13, 1876; decided June 20, 1876.)

APPEALS from orders of the General Term of the Supreme Court in the third judicial department, affirming orders of Special Term referring said actions.

The actions were not referable without consent of parties. By consent of the attorneys of the respective parties an order was entered referring them to a referee named. After a partial hearing was had, the referee refused to act further. Whereupon motions were made for the appointment of another referee in his place, which were granted. Appellant's counsel appeared and opposed.

J. E. Dewey for the appellant. The order of reference being without consent and against the objection of appellant, was in violation of the statute. (Code, §§ 270–273.) A particular referee having been agreed upon, another could not be substituted in his place without consent. (Story on Bailm., § 428; Story on Agency, §§ 12–15; *Haner* v. *Bliss*, 7 How., 247; *Weeks* v. *Lyon*, 18 Barb., 530, 531; *Reynolds* v. *Douglas*, 12 Pet., 497, 505, 506; *Turner* v. *Burrows*, 1 Hill, 627; *Billings* v. *Vanderbrek*, 15 How., 296, 297; *Sharp* v. *Mayor, etc.*, 31 Barb., 579, 589.) The appeal from the order of refer-

ence was proper. (Code, § 11, sub. 4; *Townsend* v. *Hendricks*, 40 How., 143; *Van Marter* v. *Hotchkiss*, 1 Keyes, 587; *Kain* v. *Delano*, 11 Abb. [N. S.], 29.)

Henry Smith for the respondent. The right to trial by jury having been waived by the consent to refer, could not be recovered. (*Embury* v. *Conner*, 3 N. Y., 518; 6 Hill, 47; 5 id., 468; 24 Wend., 337; 2 Alb. L. J., 384.)

ALLEN, J. These actions could not have been originally referred without the consent of the parties, for the reason that the trials thereof did not require the examination of a long account. (Code, § 271.) By consenting to refer to a particular referee, named in the consent and in the order, the parties did not waive the right to a trial either by the court or by a jury if, for any reason, the reference agreed upon should fall through. Upon the death, removal or refusal of the referee to act, the actions were again in the court for trial, as prescribed by law, as if no reference had been consented to. A waiver of a right for a special purpose or upon a stipulated condition, is not a general waiver of such right when such purpose has either been accomplished or failed, or the conditions have ceased to exist or are not complied with. The reasons why, if the power existed in the court to hold the party to his consent to refer to a person other than that agreed upon, it should not be exercised, are well stated in *Haner* v. *Bliss* (7 How., 246), *Billings* v. *Vanderbrek* 15 id., 295), *Sharp* v. *The Mayor, etc., of New York* (31 Barb., 579). If the court had the power to order a new reference, the first having fallen through, we cannot review the exercise of the discretion. We are of opinion, however, that the referee first agreed to and appointed not acting, and the reference therefore failing, the court had not the power to order a new reference without the consent of the parties.

The right to object to a reference was not waived by a consent upon conditions not complied with. (*Turner* v. *Burrows*, 1 Hill, 627; *Weeks* v *Lyon*, 18 Barb., 530; *Reynolds* v. *Douglass*, 12 Peters, 497.) The parties consented to a par-

directly, and the subsequent effects produced thereby in consequence of the previous use thereof. The intention, evidently, was to limit the liability of the company by the contract with the assured, and not to incur any responsibility when the injury occurred while the assured was directly under the influence, or where the result was remotely produced by intoxicating drinks. Accidental policies are issued principally to travelers or persons exposed to unusual peril and danger, and the risk in such cases being extremely hazardous it is by no means unreasonable that the insurer should require that the assured should be under no exciting influence which may affect his self-possession or judgment, or seriously interfere with the free, full and deliberate exercise of his faculties in protecting himself from accident or harm. It follows that the proposition laid down by the judge was erroneous; and he also erred in refusing to charge as requested.

We are referred to the case of *Bradley* v. *The Mutual Benefit Life Insurance Company* (45 N.Y., 422), as an authority adverse to the views expressed; but we think it does not support the doctrine contended for, and is not in point. The policy in that case contained a proviso that in case the insured should die "in the known violation of any law of the State he is permitted to visit, the policy shall be void." It was held, that to justify the court in taking from the jury the question whether the deceased came to his death in a manner covered by this clause, that whatever be the nature of the violation of law claimed as avoiding the policy, the death must clearly appear to have been the natural and legitimate consequence of such violation. It was evident from the proviso contained in the policy in the case cited, that a relation must exist between the violation of law and the cause of the death, for any other construction would be unwarranted and clearly beyond the meaning of the policy. It is also manifest from the phraseology employed, that no liability was incurred if the assured was engaged in the violation of law unless such violation had some connection with the cause of his death. If the provision had been that if the assured should die *while*

engaged in the violation of any law, there would be some ground for claiming that there was an analogy between the two cases; although, even then, it might be questioned whether such a condition was applicable to all cases of a violation of law. In the case at bar the proviso is absolute, direct and unequivocal, and the circumstances are entirely different; besides, there are strong and unanswerable reasons which do not apply in the case cited, for the insertion of such a clause in a policy of this kind, for the purpose of protecting the company from the reckless and improvident acts and conduct of the insured, which may have been induced by the improper use of intoxicating drinks. The decision in the case cited was made in view of the circumstances presented and with reference to the language employed, and upon no fair interpretation can it be considered as controlling in the case at bar. Nor does the case of *Welts* v. *The Connecticut Mutual Life Insurance Company* (48 N. Y., 34) affect the case now considered. It was properly held in that case that an employment by military authority in building a railroad bridge was not within the prohibition of the policy, forfeiting the same, if the assured should enter into any military or naval service without the consent of the company. This principle can have no application where the prohibition is in express terms against an act or conduct which may directly tend to produce death or an injury and which, beyond question, seriously affects and increases the risk of the insurer.

As the judge erred, upon the trial, the judgment was properly reversed and a new trial granted.

The order must be affirmed and judgment absolute ordered for the defendant, with costs.

All concur.

Order affirmed, and judgment accordingly.

N. Y. and E. R. R. Co., 15 N. Y., 455; *Weed* v. *Panama R. R. Co.*, 17 id., 362; *De Camp* v. *M. and M. R. R. Co.*, 12 Iowa, 348; *Alger* v. *M. and M. R. R. Co.*, 10 id., 268; *Ill. C. R. R. Co.* v. *Downey*, 18 Ill., 259; *Isaacs* v. *Third Ave. R. R. Co.*, 47 N. Y., 122, 128; *Crocker* v. *N. L. W. and P. R. R. Co.*, 24 Conn., 265; *Thames Stbt.* v. *Hous. R. R. Co.*, id., 40.)

O. W. Chapman for the respondent. Plaintiff having paid his fare in the manner required by defendant, and complied with all its rules and regulations, had a right to resist being put off the train. (*Putnam* v. *B. and Seventh Ave. R. R. Co.*, 55 N. Y., 108, 114; *Hibbard* v. *N. Y. and E. R. Co.*, 15 id., 445; *Townsend* v. *N. Y. C. and H. R. R. R. Co.*, 56 id., 295; *Higgins* v. *W. Tpke. and R. R. Co.*, 46 id., 23; *Sandford* v. *Eighth Ave. R. R. Co.*, 23 id., 343.)

MILLER, J. From the finding of the jury upon the trial, at the Circuit, we are authorized to assume that the plaintiff had paid his fare and was rightfully upon the train when he was removed by defendant's conductor. This being conceded as to the actual state of the case, the judge properly refused to charge in accordance with the request of the defendant's counsel, that even if the conductor had no right to remove the plaintiff from the cars, if he resisted to such an extent that extraordinary force became necessary to remove him, and he was injured thereby, he could not recover for such injury. The judge was also clearly right in charging, in response to this proposition, that if the plaintiff was lawfully there he had a right to resist the conductor in removing him, and his resistance could not be urged against his right to recover damages. When a conductor is in the wrong the passenger has a right to protect himself against any attempt to remove him, and resistance can lawfully be made to such an extent as may be essential to maintain such a right. Cases occur where circumstances may imperatively require that the passenger should remain on the train on account of others who may be there in

his charge, or where it is indispensable that he should hasten on his journey without delay; and if by reason of the mistaken judgment or willfulness of the conductor, he could be expelled when lawfully there, serious injury might follow. The law does not, under such circumstances, place the passenger within the power of the conductor; and when lawfully in the cars, he is authorized to vindicate such right to the full extent which might be required for his protection.

The judge was also right in refusing to charge the jury that if they found that the plaintiff resisted, when being put off the train, more than was necessary to protect his legal rights and to avail himself of his legal remedy for a breach of contract on the part of the defendant, and was thereby injured, he could not recover. As the plaintiff was lawfully on the train, he was clearly justified in resistance to the extent which might be necessary, to prevent his being ejected. The evidence establishes that he did not resist enough to retain his position on the cars; and it does not distinctly appear that he resisted beyond what was necessary for that purpose, or that he received any injury by resisting. Under these circumstances it may be questionable whether the request was applicable. If it was, the charge covered sufficiently the request made. It may also be remarked, that as there was evidence to show that the train was in motion at the time, the law of self-preservation justified the plaintiff in repelling any attempt to eject him which would endanger his life or subject him to great hazard and peril. (*Sanford v. The Eighth Av. Railroad Co.*, 23 N. Y., 343.) The act of resistance, under such circumstances, would be for the protection of his life or from probable serious injury; and he was not called upon in such a moment of extreme necessity to determine, with exact precision, whether he used more force than was required. It is said that this distinct point was not taken by the plaintiff upon the trial. The answer is, that the fact, if it existed, was a part of the entire case and of the evidence upon the trial, which properly belonged to the consideration of the jury, and it is not apparent how or in what manner the point could be raised

so as to present a question of law and constitute a part of the record. We are referred to the case of *Townsend* v. *The New York Central and Hudson River Railroad Company* (56 N. Y., 295) as authority for the doctrine that no one has a right to resort to force for the performance of a contract made with him by another. In that case the passenger had surrendered his ticket to a conductor of another train, upon which he had been traveling, and had no lawful right to ride with a new conductor, who had no knowledge that he had a ticket, and who was bound by one of the rules of the company to eject him if he failed to show his ticket or to pay his fare when demanded. While the remarks in the opinion of the learned judge, embracing the proposition referred to, might be entirely appropriate in that case, it cannot be urged, upon any rational hypothesis, that they have any application whatever where the conductor was wrong and acted in violation of law. In the latter case the passenger could not be regarded as resorting to force to enforce a contract while he was merely resisting an unauthorized assault upon his person and an unjustifiable invasion of his rights.

The request, as made, was also liable to objection because it assumed that the resistance in part should be limited to such force as might be required to enable the plaintiff to prosecute the defendant for a breach of the contract. A mere assertion of a right would be sufficient for such a purpose, without actual force, and hence the request was clearly wrong, and embraced too much. For the reasons stated the request to charge was erroneous, and properly refused.

Some other questions are raised by the counsel for the defendant, but they are sufficiently considered and properly disposed of in the opinion of the General Term, and do not require especial comment.

No error appearing in the record before us, the judgment must be affirmed, with costs.

All concur; ALLEN and EARL, JJ., concurring in result; FOLGER and ANDREWS, JJ., absent.

Judgment affirmed.

Statement of case.

ABRAM M. DE WITT, Appellant, v. THE ELMIRA NOBLES MANUFACTURING COMPANY, Respondent.

One owning an undivided interest in letters patent cannot maintain an action in a State court to recover compensation for its use to the extent of his interest from one using it without his permission. The cause of action does not arise upon contract, but is simply the infringement of a patent right, and so arises under the patent laws of the United States; the United States courts, therefore, have exclusive jurisdiction (ALLEN, J.; CHURCH, Ch. J., and EARL, J., concurring).

It seems, that the license of one of two or more owners in common of letters patent confers a right as against all, and the remedy of the other tenants in common is by action for an account for whatever may have been received by the licensor.

So, also, one of two or more tenants in common has the right to use the invention without the consent of the others, and is not liable to account to them for the profits made by such use.

Pitts v. *Hall* (3 Blatchf. C. C. R., 201) distinguished.

(Argued June 15, 1876; decided June 20, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order affirming an order of Special Term sustaining a demurrer to plaintiff's complaint. (Reported below, 5 Hun, 301.)

The complaint in this action alleged, in substance, that in August, 1871, letters patent were duly issued to Richard N. Watrous and W. W. Kellogg for an alleged new and useful improvement in the construction of dies for forming the lips of auger and auger bits; that in September, 1871, said Kellogg duly assigned his interest in such letters patent to one George Worrall, who owned the same until in October, 1874, when he assigned all his interest therein to the plaintiff herein; that at or about the time of the granting of said letters patent said Watrous made and had some arrangement and agreement with the defendants whereby they were, so far as the said Watrous was and is concerned, to have the right to use said improvement in the manufacture of augers, and that the defendants have used the same in their business since about the time of

Statement of case.

the transfer by Kellogg to Worrall, and still continued to use the same and have derived benefits from the use of the same; that said arrangement and agreement between said Watrous and the defendants had reference only to the rights and interests of said Watrous; that before the commencement of this action the plaintiff requested the defendants to account to him for the use of said improvement, and pay over whatever sum was due to the plaintiff by reason of the use thereof as aforesaid, "as tenant in common of said improvement and letters," which the defendants refused to do, and as relief asks that the defendants pay to the plaintiff one-half of the value of the use of such improvement and for an accounting.

The defendant demurred upon two grounds: First. That the complaint did not state facts sufficient to constitute a cause of action. Second. That the court had no jurisdiction of the subject of the action.

E. P. Hart for the appellant. The rule that one tenant in common cannot sue his co-tenant for the sole use of the common property in the absence of some agreement does not apply and cannot be invoked by defendant. (14 Mass., 149; 18 Barb., 265.) The rule that one tenant in common of land using the whole is not liable to his co-tenants for the rents and profits received does not apply to patented rights owned by different parties. (*Sargent* v. *Parsons*, 12 Mass., 153; *Pitts* v. *Hall*, 3 Blatch., 201–206; *Mathers* v. *Green*, 34 Beav., 170.)

S. Dexter for the respondent. Plaintiff and defendant were not partners in the ownership of the letters patent or in any of the rights secured thereby. (Curtis on Patents [4th ed.], 209, 210; *Parkhurst* v. *Kinsman*, 2 Blatch., 72; *Clum* v. *Brewer*, 2 Curt. C. R., 506, 524.) One tenant in common of real estate cannot be called to account for benefits derived from the use of the common property if he has not excluded his co-tenant therefrom. (*Woolever* v. *Knapp*, 18 Barb., 265; *Dresser* v. *Dresser*, 40 id., 300; *Wilcox* v. *Wilcox*, 48 id., 327; Story on Part., § 89.) This rule applies to patents. (Curtis

on Patents [4th ed.], 210, 214.) This action can only be maintained in a United States court. (*Dudley* v. *Mayhew*, 3 N. Y., 9; *Hovey* v. *Rub. Tip Pencil Co.*, 57 id., 119; U. S. R. S., § 711, p. 135.)

Allen, J. The plaintiff does not claim to recover of the defendant for the use of the patent-right and the patented invention, referred to in the complaint, by virtue of any contract, expressed or implied, or any agreement by the defendant to pay the plaintiff any compensation or royalty for the right to use the same. In substance, the allegations of the complaint are of a use of the patented invention by the defendant without the consent of, or any license or permission by, the plaintiff. The arrangement and agreement between Watrous, the owner of the patent in common with the plaintiff, and the defendant, is not set out in the complaint, or its terms disclosed. It does not appear from any allegation, and was not claimed by the counsel for the appellant, that the latter is entitled to compensation from the defendant by the terms of that arrangement and agreement. No claim is asserted under it. The plaintiff's claim rests wholly upon the rights conferred by law upon him as an owner of an undivided interest in the patent, to recover compensation for its use to the extent of his interest, from one using it without his permission.

The action thus stated is simply an action for an infringement of the patent and for damages, the plaintiff waiving the tort and seeking for an accounting and to recover as upon a *quantum meruit*. Whatever may be his legal rights, they are not varied by a change in the form of action, and do not depend upon contract, but arise under the patent-right laws of the United States, of which the United States courts have exclusive jurisdiction. (R. S. U. S., § 711; *Hovey* v. *Rubber Tip Pencil Co.*, 57 N. Y., 119; *Dudley* v. *Mayhew*, 3 id., 9.) The first cause of demurrer, to wit, that the court has no jurisdiction of the subject of the action, is well assigned, and entitles the defendant to an affirmance of the judgment.

But, if we pass that question, the demurrer was properly

sustained by the court below for the reason that the complaint does not state facts sufficient to constitute a cause of action. The allegations of the complaint as to the arrangement and agreement between Watrous and the defendant are consistent with the fact that Watrous merely stipulated and agreed that he would claim no damages in respect to his share and interest in the patent, for an infringement thereof in the use of the patented invention by the defendant. This would leave the defendant liable in damages, for a violation of the rights of the patentees, with an estoppel or stipulation operative against one of the owners, effectual to defeat a recovery by him in respect to his share and proportion. Or, consistently with the averments in the complaint, the arrangement and agreement of Watrous may have been a license and permission by him for a use of the invention by the defendant. If such was the effect of the arrangement, the license of one or more of several owners in common of letters patent confers a right as against all; and the remedy of the other tenants in common is by action for an account for whatever may have been received by them. Judge CURTIS lays down the proposition in these words: "One tenant in common has a good right to use, and to license third persons to use the thing patented as the other tenant in common has. Neither can come into a court of equity and assert a superior equity unless it has been created by some contract modifying the rights which belong to them as tenants in common. (*Clum* v. *Brewer*, 2 Curt. C. C. Rep., 506.) If, as may be claimed, the arrangement and agreement of the defendant with Watrous was a general or a limited assignment, an assignment for a special purpose, and to a limited extent, of his interest in the patent right, then, by such assignment it may be claimed that the defendant became a joint owner with the plaintiff in the invention, or thing patented, either generally or to a limited extent, or a particular territory, and had a right to use it without the consent of the plaintiff, and is not liable to account to him for the profits made by said use. (*Mathers* v. *Greene*, L. R., 1 Ch. Ap., 29.) The question in *Pitt* v. *Hall*

(3 Blatch. C. C. Rep., 201) arose upon a special agreement between the parties, and its construction and effect; and the decision does not affect the case in hand. I incline to the opinion that the plaintiff has not, by his complaint, made a cause of action entitling him to relief in any court; but I prefer to rest the judgment on a want of jurisdiction, in the State courts, over the subject-matter of the action. State courts will entertain jurisdiction of actions upon contract and other actions in which patent rights come in question collaterally. (*Middlebrook* v. *Broadbent*, 47 N. Y., 443; *Beebe* v. *McKenzie*, id., 662.) But here the action is directly for a violation of rights conferred by the patent laws of the United States, and depends entirely upon the effect to be given to those laws and the relation established by them between tenants in common of patents, and the resulting legal rights of joint owners of patents between themselves and between one or more of several owners in common and third persons, and does directly arise "under the patent-right laws." These laws, and not the convention and agreement of the parties, are the foundation of the action. The defendant has not, by his acts or by any agreement with the plaintiff, recognized the validity of the patent or of any title of the plaintiff thereto, and is not estopped from contesting both.

For the reason last stated, the judgment must be affirmed.

All concur, except Miller, J., not voting; Rapallo, J., concurring, on ground of insufficiency of complaint; Folger and Andrews, JJ., absent.

Judgment affirmed.

Statement of case.

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GEORGE ALEXANDER, Respondent, *v.* GERMANIA FIRE INSURANCE COMPANY, Appellant.*

A policy of fire insurance, by its terms, insured plaintiff against loss "on his two-story and extension shingle-roof building, *occupied as dwelling.*" In an action upon the policy it appeared that at the time it was issued the building was unoccupied. *Held*, that the clause was a warranty that the house was occupied as a dwelling; and that it being unoccupied, there was a breach of the warranty which avoided the policy.

The policy also contained a clause, in substance, that any person other than the assured procuring the insurance to be taken shall be deemed to be the agent of the assured, not of the company. *Held*, that under this clause defendant was not bound by knowledge on the part of the agent, through whom the policy was procured, that the house was unoccupied.

Also, that, assuming he was agent of defendant for the purpose of taking the application, his knowledge of the falsity of the warranty did not affect its validity.

(Argued January 25, 1876; decided February 22, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department in favor of plaintiff, entered upon an order directing judgment on a verdict.

This action was upon a policy of fire insurance issued by defendant to plaintiff, insuring him, as stated in the policy, "on his two-story and extension frame shingle-roof building, occupied as dwelling, situate," etc. "It is a part of this contract that any person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance."

The building was at the time the policy was issued in fact unoccupied. The application for the insurance was taken by one Brewster, who was engaged in soliciting business, taking and filling out applications, receiving premiums, etc., for defendant. He was aware at the time he took the application that the house was vacant. The building was destroyed by fire.

* The opinion in this case was mislaid, and thus it did not appear in its order.

Statement of case.

Upon the trial, at the close of plaintiff's evidence, defendant's counsel moved to dismiss the complaint upon the following grounds: "First. That it is apparent from the evidence in the case that if the minds of the parties met at all they met in this contract, which is in evidence, in writing, before the court and jury, and by the terms and conditions of that contract included in the papers in proof the policy is void. Second. The occupation was a warranty by the insurer, and non-occupation a breach of it, and avoided the policy. Third. The plaintiff bringing the action on this contract seeks to affirm it in part. He cannot do so. He must stand or fall by the entire contract, and by its terms he must fall." The court denied the motion, and defendant excepted.

The court directed a verdict for the plaintiff for the amount of the loss, subject to the opinion of the court at the General Term.

B. C. Chetwood for the appellant. The statements as to occupation were warranties. (*Brown* v. *Cat. Co. Ins. Co.*, 18 N. Y., 392; *Chase* v. *Ham. Ins. Co.*, 20 id., 52; *Leroy* v. *Market F. Ins. Co.*, 39 id., 90; 45 id., 80; *Parmelee* v. *Hoff. F. Ins. Co.*, 54 id., 193; *Cott* v. *Phœnix F. Ins. Co.*, id., 595; *Owens* v. *Hol. Pur. Ins. Co.*, 56 id., 565; *Jennings* v. *Chen. Mut. Ins. Co.*, 2 Den., 75; *Sarsfield* v. *Met. Ins. Co.*, 42 How. Pr., 97; *Smith* v. *Empire Ins. Co.*, 25 Barb., 497.) The non-occupation of the building was a breach of the warranty and avoided the policy. (*Jennings* v. *Chenan. Mut. Ins. Co.*, 2 Den., 75; *Mead* v. *Northumberland Ins. Co.*, 3 Seld., 530; *Wustum* v. *City F. Ins. Co.*, 15 Wis., 138; *Harrison* v. *City F. Ins. Co.*, 9 Al., 231; *Witherell* v. *Marine Ins. Co.*, 49 Me., 200; *Ripley* v. *Ætna. Ins. Co.*, 30 N. Y., 136.) Warranties extend even to known defects. (*Kennedy* v. *St. L. Co. Mut. Ins. Co.*, 10 Barb., 285; 2 Den., 75.)

J. L. Smith for the respondent. Brewster was defendant's agent. (*Bodine* v. *Ex. F. Ins. Co.*, 51 N. Y., 117; Flanders on F. Ins., 166, 167; *Barber* v. *Hartf. Mut. Ins. Co.*, 25

Cow., 51; *Rowley* v. *Empire Ins. Co.*, 36 N. Y., 550; *Petry* v. *G. F. Ins. Co.*, 61 Barb., 335, 344.) There was no misrepresentation or breach of warranty. (*O'Neil* v. *Buf. F. Ins. Co.*, 3 N. Y., 124; Flanders on Ins., 257; *Reynolds* v. *Com. F. Ins. Co.*, 47 N. Y., 597; *Bowman* v. *Ag. Ins. Co.*, 2 T. & C., 261; *Owens* v. *Hol. Pur. Ins. Co.*, 56 N. Y., 565; *Cumb. Val. M. Prot. Co.*, 8 P. F. Smith, 419.) Knowledge of the agent that the building was unoccupied was knowledge of defendant. (*Ames* v. *N. Y. Un. Ins. Co.*, 14 N. Y., 253; Flanders on Ins., 303.) Defendant is estopped by this knowledge of its agent from setting up that the building was vacant. (Flanders on Ins., 167, 181–188; *Plumb* v. *Cat. Ins. Co.*, 18 N. Y., 392; 36 id., 550; *Combs* v. *Han. Svgs. Ins. Co.*, 43 Mo., 248; *People's Ins. Co.* v. *Spencer*, 3 P. F. Smith, 353; *Meadowcraft* v. *Standard F. Ins. Co.*, 11 P. F. Smith, 91; *Beal* v. *Park F. Ins. Co.*, 16 Gris., 241; *Owens* v. *Hol. Pur. Ins. Co.*, 1 T. & C., 285, 287; *Cone* v. *Niag. Ins. Co.*, 3 id., 33; *Boos* v. *World Mut. L. Ins. Co.*, 6 id., 364; 61 Barb., 479.)

RAPALLO, J. The three points made by the counsel for the defendant, on the motion to dismiss the complaint, embrace, in substance, but one proposition, viz.: That the plaintiff, in his contract with the defendant, warranted that the building insured was occupied as a dwelling, and that the breach of this warranty avoided the policy.

By the terms of the policy the defendant insured the plaintiff against loss, etc., "on his two-story and extension frame, shingle-roof building, occupied as dwelling, situate," etc.

This was clearly a warranty that the building was, at the time of the insurance, occupied as a dwelling. The description and location of the building were fully set forth. The statement that it was occupied as a dwelling was not necessary for its identification, and could have been inserted for no other purpose than as a statement of a fact relating to the risk. The case of *Wall* v. *The East River Mutual Insurance Company* (7 N. Y., 370) is in point upon this question. That case adopts

the definition of a warranty contained in 13 Connecticut, 544, viz.: That "any statement or description on the face of the policy, which relates to the risk, is a warranty," and holds that the same rule which prevails as to marine policies is applicable to fire policies. It was there decided that where a policy covering a rope-maker's stock, described it as contained in a brick building, with tin roof, *occupied as a storehouse*, and about forty-two feet distant from the rope-walk, etc., the statement that the building was occupied as a storehouse was a warranty.

That case was followed in *Parmelee* v. *Hoffman Fire Insurance Company* (54 N. Y., 193), where a building was described in the policy as being occupied by the assured, and it was held that this was a warranty. The present case clearly shows that the statement as to the occupancy of the building related to the risk, for the policy provides that if the premises become vacant and unoccupied the policy shall become void.

This view of the case renders it unnecessary to determine whether the statement as to occupation contained in the application was a warranty. There would be a difficulty in so holding, for the reason that it does not appear in the case that the application was referred to in the policy or made part of it. (See *Owens* v. *Holland Purchase Co.*, 56 N. Y., 565.)

The plaintiff claims that the knowledge of Brewster, the agent who procured the insurance, that the house was unoccupied, destroys the effect of this warranty. Assuming that Brewster was the agent of the company for the purpose of taking the application for the policy, his knowledge of the falsity of a warranty in terms contained in the policy could hardly affect the validity of the warranty. (*Chase* v. *Hamilton Ins. Co.*, 20 N. Y., 52, 56.) Such a case would not fall within the principle of *Rowley* v. *The Empire Insurance Company* (36 N. Y., 550).

But the policy now in question contains an express agreement, that any person other than the assured who may have procured the insurance to be taken by the company, shall be

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deemed to be the agent of the assured, and not of the company under any circumstances whatever, or in any transaction relating to the insurance. In *Rohrbach* v. *The Germania Insurance Company* (62 N. Y., 47), this court decided that this clause was operative and precluded the assured from claiming that the company was bound by the knowledge of a similar agent through whom a policy had been procured.

It is conceded that the house was vacant and unoccupied at the time of effecting the insurance, and so continued up to the time of the fire. This was a breach of the warranty, which, according to well-settled rules of law, avoided the policy.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except CHURCH, Ch. J., and MILLER, J., not voting.

Judgment reversed.

66	468
112	305
66	468
116	158
66	468
124	485
66	468
127	533
66	468
160	288
66	468
170	1490

PHILENA B. FISHER, Administratrix, etc., Respondent, *v.* STANLEY A. BANTA, Impleaded, etc., Appellant.

The will of B. directed his executrix to divide his real estate equally between his two sons C. and S., after the youngest arrived at the age of twenty-three. In a codicil he directed his executrix to sell all his real estate. Both sons survived the testator. In an action for a construction of the will, *held*, that there being no purpose for the sale expressed in the codicil, the fair inference was it was for the purpose of division; that as the sons survived, the purpose had not failed; and that the direction to sell operated as a conversion of the real estate into personalty immediately upon the death of the testator and the land became money for all purposes of administration, the sons taking their interest as legatees; and that upon the death of C. before actual sale, his interest passed to his personal representatives.

Also, *held*, that conversion was not prevented because the legal estate was not given in trust to the executrix, or because there was no devise of the lands, and they passed by descent to the two sons.

C. died soon after B., leaving a will by which he bequeathed certain legacies and made his brother C. residuary devisee and legatee. The execu-

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trix of B. sold portions of the real estate, and upon an accounting by her the proceeds were brought into court and distributed by decree of the surrogate as personal estate, one moiety to S., the other to H., executor of B., who therewith paid the legacies in part. Before the balance of the lands were sold the executrix died and H. was appointed administrator, with will annexed. The share of C. in the estate of B. was the only source from which the legacies given by his will could be paid. On an accounting had at the request of H. as such administrator, S. and H., as the executors of C., were made parties; the legatees were not. The surrogate adjudged, in substance, that there was no conversion of the real estate of B. under his will, and that S., as residuary devisee under the will of C., was entitled to one-half the real estate unsold and one-half the proceeds of what had been sold, and settled the accounts under this theory. H. refused to appeal or to allow the legatees to appeal in his name, although they offered indemnity. *Held*, that the legatees were not concluded by the decree, as the estate of C. was not represented on the accounting in such a sense as to bind them; that while in ordinary cases, in proceedings upon application of an executor or administrator for an accounting, the service of a citation upon the executor or administrator of a deceased legatee would be sufficient, in the absence of fraud or collusion, to bind the estate, yet as here H. represented both estates, the legatees should not be concluded by a proceeding by him against himself, but should have been made parties; and that said legatees could maintain an action for a construction of the wills.

(Argued March 29, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiffs, entered upon a decision of the court at Special Term.

This action was brought to obtain a construction of two wills, one that of Albert Banta, the other that of Charles Edward Banta, son of said Albert Banta. The plaintiffs are the general legatees under the will of said Charles Edward Banta. Defendant George Hubbell is executor of the said will, and also administrator, with the will annexed, of Albert Banta. Defendant Stanley A. Banta is the son of Albert Banta.

The court found the following facts, in substance:

That Albert Banta died prior to the 10th day of February, 1864, possessed of a large quantity of real estate, part of which was situated in this State and part in the State of Iowa,

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and of sufficient personal property to satisfy the legacies bequeathed to his sons and to furnish the annuity provided for the widow, as hereafter stated; that said Albert Banta left him surviving two sons, Charles Edward and Stanley Adelbert, and a widow, Sarah A., who constituted his only heirs and next of kin; that he left a last will and testament, bearing date February 3, 1858, and a codicil thereto, bearing date August 20, 1862, which were duly admitted to probate by the surrogate of Ontario county, and letters testamentary were duly issued to said widow, Sarah A. Banta, who accepted said trust and continued to act as such executrix till her death.

The will gives legacies of $1,000 each to the two sons, and provides for their support and the support of their mother, during their minority, "out of the rents, issues and profits" of the estate. It also gives to the widow the use of the homestead and furniture for life, and an annuity of $500 a year after the sons reach twenty-one, during her life, in lieu of dower. An investment is directed sufficient to produce such annuity.

The sixth clause of the will is as follows:

"Sixth. After my youngest child shall arrive at the age of twenty-three years, I direct my executors to divide my real estate equally between said sons, Charles Edward and Stanley Adelbert."

The seventh item gives, subject to the foregoing bequests: to his two sons, share and share alike, all his personal property, to be divided on his youngest one arriving at the age of twenty-three, except the investment for the benefit of the widow, which was not to be divided until after her decease.

The codicil simply contained a direction requiring his executrix to sell and dispose of all his real estate.

That said executrix, by virtue of said will and codicil, disposed of the real estate situated in the State of Iowa, for cash, and on the 2d day of October, 1867, and on the 13th day of December, 1869, had two distinct accountings before said surrogate, who upon each of such accountings duly decreed that

the money then in such executrix's hands should be distributed as so much money in her hands as executrix; that the sum of $8,000 was set apart and invested in United States bonds, by said executrix, to raise the annuity of $500 for the use of said widow, as in said will directed, and that the same was kept so invested, and remained in the hands of said executrix, together with the accumulations thereon over and above said annuity, up to the time of her death; that on the 8th day of October, 1870, said executrix died, and on the fifteenth day of same month the defendant, George Hubbell, was duly appointed administrator *de bonis non* with the will annexed, of the estate of Albert Banta, deceased; that he accepted such trust, and still continues such administrator; that, at the time said defendant was so appointed he came into the possession of all the personal estate of said Albert Banta, then remaining undisposed of, together with the $8,000 in the form of bonds, and its accumulation as aforesaid.

That after the death of said Albert Banta, and in the month of September, 1864, Charles Edward, one of the said sons of Albert Banta, died, unmarried, leaving the defendant Stanley Adelbert his sole heir and next of kin; that at the time of such death said Charles Edward was over the age of twenty-three years.

That he left his last will and testament, bearing date September 10, 1864, which was duly admitted to probate and letters testamentary thereunder were on that day duly issued to the defendant George Hubbell, as executor, who accepted such trust, and still remains such executor. In and by said will said Charles Edward gave legacies to the plaintiffs amounting to $18,000, and gave all the rest and residue of his property to his brother, Stanley Adelbert Banta.

That said Charles Edward, at his death, was possessed of no property except what he derived from the estate of his father, said Albert Banta, and that he had only received from such estate $1,000, of which sum but a few dollars remained at his decease; that the defendant George Hubbell, as executor, has paid to plaintiffs on account of their said legacies, in pro-

portion to their respective legacies, the sum of $13,781.01, leaving the balance of said legacies unpaid.

That all the real estate remaining undisposed of at the death of Sarah H. Banta, executrix, was vested in the defendant Stanley A. Banta, and that at that time he entered into possession thereof, and has continued to enjoy the same ever since.

That said defendant George Hubbell, as administrator *de bonis non*, on the 27th day of March, 1871, had, upon his own application, a final accounting before said surrogate; that said surrogate decreed, that of the assets then in the hands of said administrator, one-half thereof should be paid to the defendant Stanley A. Banta, and the remaining one-half to the defendant George Hubbell, as trustee of the estate of Charles Edward Banta, to be held by him for the sole benefit of the defendant Stanley A. Banta.

That the only parties cited to appear on that accounting were defendant George Hubbell, as executor of Charles Edward Banta, deceased, and defendant Stanley A. Banta; that the plaintiffs were not in any manner represented on such accounting; that the defendant Hubbell, as executor of said Charles Edward, refused to appeal from said decree, and refused to allow plaintiffs, or either of them, to appeal in his name, although they offered to indemnify him fully against all costs and liabilities; that defendant Hubbell, as executor of said Charles Edward Banta, has refused and still refuses to pay these plaintiffs, or either of them, any sum whatever towards the satisfaction of their said legacies, since the accounting and decree aforesaid.

As conclusions of law, the court found, that upon the death of Albert Banta, his estate, both real and personal, vested in his sons in equal parts, subject to the charges and provisions made in favor of the widow; that by the terms of the will of Charles Edward Banta, the plaintiffs were entitled to the payment of their legacies, together with interest, to be computed after one year from the death of testator; that said legacies, by the terms of said will, were made a charge and lien upon

any estate, real or personal, vested in said testator at the time of his death.

That the decretal order made by the surrogate, on the 27th day of March, 1871, was in no wise valid and binding on plaintiffs; and it appointed a referee to investigate the accounts of Hubbell, as administrator of Albert Banta and as executor of Charles Edward Banta, and directed the defendants to pay over to the referee any and all assets of the two estates in their possession, save that defendant Stanley A. Banta was authorized to retain one-half the residuary estate of Albert Banta, and that the referee, from the assets received by him belonging to the estate of Charles Edward Banta, satisfy plaintiff's legacies.

The General Term, upon appeal, affirmed the decision and findings, save so much thereof as authorized the referee to act as receiver, and in lieu thereof authorized plaintiff, if defendant refused to comply with the decree as to an accounting, or if, after accounting before the referee, he refuse to provide for the payment of plaintiff's legacies to apply for the appointment of a receiver. An accounting was had before the referee, who found that there was in the hands of Hubbell, as administrator *de bonis non* of Albert Banta, $9,134.58; of which the sum of $4,938.34 belonged to the estate of Charles Edward Banta; also, that there were portions of Albert Banta's real estate unsold. This report was confirmed and judgment was entered directing Hubbell to pay to plaintiffs the moneys so in his hands belonging to Charles Edward Banta's estate, less certain specified deductions, and appointing a referee to sell the real estate in this State, etc.

E. H. Morse for the appellant. There was, by the will of Albert Banta, no equitable conversion of his real estate into money. (*Kinnier* v. *Rogers*, 42 N. Y., 531–535; *Post* v. *Hover*, 33 id., 593, 599; 1 Jarman on Wills, 465; *Lynes* v. *Townsend*, 33 Mass., 593, 599; *Reynolds* v. *Reynolds*, 16 id., 257; 1 Wms. on Exrs., 554, 555; 2 Spence on Eq. Jur.,

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261; *Bogert* v. *Hertell*, 4 Hill, 492; *Smith* v. *Claxton*, 4 Mad., 484; *Harris* v. *Clark*, 7 N. Y., 242, 260; *White* v. *Howard*, 46 id., 144, 162; *Wright* v. *Trustees*, 1 Hoff., 203, 218; *Randall* v. *Bookey*, Prec. in Ch., 162; *Emblyn* v. *Freeman*, id., 541; *Hawley* v. *James*, 5 Paige, 318, 344; 7 id., 213, 219; L. & D. on Eq. Conv., 93, 116; *Ackroyd* v. *Smithson*, 1 Br. C. C., 503; *Cruse* v. *Barley*, 2 P. Wms., 22; 1 Roper on Legacies, 530; *Jackson* v. *Janson*, 6 J. R., 651, 660; *Wood* v. *Keyes*, 8 Paige, 365; O'Hara on Wills, 157; 2 Keen, 653; *In re Fox*, 52 N. Y., 530; *Hoppock* v. *Tucker*, 59 id., 208; *Smith* v. *Claxton*, 4 Mad., 484; *Ross* v. *Roberts*, 4 N. Y. Supr. C., 318.) The decree of the surrogate of March 27, 1871, was valid and effective to conclude any person interested in the estate of Charles Edward Banta. (*Dyckman* v. *Mayor, etc.*, 5 N. Y., 443; *Sheldon* v. *Wright*, id., 497, 514; *Voorhees* v. *Bk. of U. S.*, 10 Pet., 449; *B. Svg. Bk.* v. *Eldridge*, 28 Conn., 556; *Bailey* v. *Ryder*, 10 N. Y., 363, 370; *Schooner Hoppett* v. *U. S.*, 7 Cranch, 389; *Harrison* v. *Nixon*, 9 Pet., 503; *Galand* v. *Davis*, 4 How. [U. S.], 148; *Thomas* v. *Austin*, 4 Barb., 265, 273; *N. Y. C. Ins. Co.* v. *Nat. Pro. Ins. Co.*, 20 id., 468, 473; 2 R. S., 97, § 66; *Graham* v. *Dewitt*, 3 Brad., 192; *Fisher* v. *Hepburn*, 48 N. Y., 41; *Mead* v. *Mitchell*, 17 id., 210; *Cole* v. *Reynolds*, 18 id., 74, 77; *Bk. of Poughkeepsie* v. *Hasbrouck*, 6 id., 216; *Wright* v. *Trustees*, 1 Hoff. Ch., 202; *Smith* v. *Lawrence*, 11 Paige, 206; *McGregor* v. *McGregor*, 35 N. Y., 208.) It was error to hold that the legacies given to plaintiffs under the will of Charles Edward were made a charge and lien upon the real estate vested in said testator at the time of his death. (*Lupton* v. *Lupton*, 2 J. Ch., 614, 623; *Reynolds* v. *Reynolds*, 16 N. Y., 257; *Kinnier* v. *Rogers*, 42 id., 531; *Lynes* v. *Townsend*, 33 id., 562; *Simpson* v. *English*, 4 T. & C., 80; *Goddard* v. *Pomeroy*, 36 Barb., 546; *Castle* v. *Gillett*, L. R., 16 Eq., 530, 544; *Lewis* v. *Darling*, 16 How. [U. S.], 1; *Tracy* v. *Tracy*, 15 Barb., 503; *R. C. Ger. Ch.* v. *Watcher*, 42 id., 43; *Shutters* v. *John*, 38 id., 80; *Myers* v. *Eddy*, 35 id., 203; Hill on Trustees, 360.)

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W. W. Rowley for the respondent. The vesting of the estate in Charles Edward and Stanley was not postponed beyond the death of their father. (*Hoppock* v. *Tucker*, 59 N. Y., 202.) They took vested interests in moieties as of the testator's death in all lands of which he died seized, not liable to be defeated by any subsequent condition of survivorship of either before arriving at the given age, and without any limitation whatever. (*Crosby* v. *Wendell*, 6 Paige, 543–548; *Stagg* v. *Jackson*, 1 N. Y., 206; 41 id., 289; 2 Edw. Ch., 156–159; *Livingston* v. *Green*, 6 Lans., 50–55; 52 N. Y., 122.) The death of one of the sons prior to the other cannot be construed as divesting the estate. (*Johnson* v. *Valentine*, 4 Sandf., 37; *Stagg* v. *Jackson*, 1 N. Y., 206; *Converse* v. *Kellogg*, 7 Barb., 590; *Doe* v. *Peruyn*, 3 T. R., 484; *Rose* v. *Hill*, 3 Burr, 381.) The intention to charge the real estate with the payment of the legacies is declared in the will and codicil. (*R. C. Ch.* v. *Watcher*, 42 Barb., 43; *Shutters* v. *Johnson*, 38 id., 80; *Taylor* v. *Dodd*, 58 N. Y., 335; 1 Tucker, 32; 2 Sandf. Ch., 131; 1 id., 132; *Hays* v. *Gourley*, 3 T. & C., 115.) A devise, grant or conveyance of the "use and income" carries the land and personal estate itself. (*Craig* v. *Craig*, 3 Barbour's Ch.; 2 Jarman on Wills [2d ed.], 376, 420; *Reed* v. *Reed*, 9 Mass., 372; *Fox* v. *Phelps*, 17 Wend., 393; *Rhodes* v. *Rhodes*, 3 Sandf. Ch., 279; 5 id., 467; 7 Hill, 305; 3 Bradf., 144, 231, 287; *Scott* v. *Guernsey*, 48 N. Y., 106.) The estate which vested in Charles E., September 10, 1864, was both devisable and assignable. (1 Redf. on Wills, chap. 9, § 30, p. 388 [ed. 1854]; Powell on Devises [1st Am. ed.], 314; Jarman on Wills, 764, 771; *Wood* v. *Cone*, 7 Paige, 472; *Coster* v. *Lorillard*, 14 Wend., 321, 350, 382; *Kane* v. *Gott*, 24 id., 641, 660; 13 Alb. L. J., 198, 199.) The doctrine of equitable conversion is applicable under the will of Albert Banta. (L. & D. on Eq. Conv., 8; 1 Jarman on Wills [3d ed.], 550; *Bogart* v. *Hartell*, 4 Hill, 492; *Johnson* v. *Bennett*, 39 Barb., 237–251; *Dodge* v. *Pond*, 23 N. Y., 69; *Chamberlain* v. *Chamberlain*, 43 id., 424; *Stagg* v. *Jackson*, 1 id., 206.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. The direction in the codicil to the will of Albert Banta, that his executor should sell all his real estate, operated as a conversion of the real estate into personalty, from the time of his death. The direction is unqualified and peremptory. It leaves no discretion to the executor, except as to the time and manner of sale. The exercise of the power of sale is subject to no condition, except that which it implied in every case of this character, that, at the death of the testator, the purposes for which a conversion was directed have not failed, but still require that the power should be exercised. In all cases where conversion takes place, it is because the purposes of the will require it. The conversion may be entire, embracing the whole estate, or partial, extending only so far as is necessary to satisfy special purposes indicated in the will. The matter to be considered is the intention of the testator. The conversion, whether absolute to all intents, or partial only, is the one or the other, because the purpose of the will, *i. e.*, the intention of the testator was that the conversion should be general or partial, for all purposes or for limited purposes only. There is no purpose specified in the codicil for which the sale is directed to be made. But, taken in connection with the will, the fair inference is that it was for the purpose of a division of his estate between the testator's two sons. By the sixth clause the executor was directed to divide the real estate between them, when the youngest should arrive at the age of twenty-three years. In the absence of a power of sale, this direction would be incapable of execution, except through an actual partition, and a setting apart of portions of the real estate in severalty to the sons. The testator owned lands in different States, and it is a reasonable construction of the will that the power of sale was given to the executor for convenience of division. But it was not an authority merely, it was an imperative direction to sell all the testator's real estate.

The sons survived the testator, and the purpose for which the sale was directed had not failed. It became the duty of the executor to sell the land and divide the proceeds between

them. From the moment of the testator's death, the conversion took place, and the land became money for all purposes of administration. The impression of money was fixed upon it; the sons took their interest in the converted property as legatees, and upon their death, before actual sale, it would pass to their personal representatives. (*Fletcher* v. *Ashburner*, 1 Bro. Ch. Cas., 497; *Leslie* v. *Craig*, 3 Wheat., 587; *Bogert* v. *Hertell*, 4 Hill, 492, and cases cited; *Stagg* v. *Jackson*, 1 Comst., 206.)

The power of sale was not affected by the death of Charles Edward Banta before the lands of Albert Banta were sold by his executor. The necessity of a sale for the purpose of a division between the surviving brother and the personal representatives of Charles Edward, continued. Nor was conversion prevented from taking place, because the legal estate was not given in trust to the person in whom the power of sale was vested, or because then there was no devise of the lands, and that they passed by descent to the two sons of the testator. (1 Jar., 465; *Post* v. *Hover*, 33 N. Y., 593; *Bogart* v. *Hertell*, *supra*.)

Upon the death of Albert Banta, in 1864, the widow of the testator qualified as executor, and took upon herself the execution of the will. Charles Edward Banta died afterwards in the same year, leaving a will, by which he gave legacies to the plaintiffs, and the rest, residue and remainder of his property to his brother, one of the defendants in this action, with a direction that his executor should retain possession, and control and manage the residue until the legatee should arrive at the age of twenty-nine years, and appointed the defendant Hubbell his executor. The executor of Albert Banta proceeded and acted upon the assumption that there was, by his will, a conversion of his real estate into personalty, which, as we have seen, was the true construction of the instrument. She sold portions of the real estate of the testator from time to time, and on two several accountings before the surrogate, had on her application in 1867 and 1869, to which the defendants were made parties (the defendant Stanley A. Banta, as legatee under his father's will, and the defendant Hubbell, as

executor of Charles Edward Banta), the proceeds were brought into court and distributed by the decree of the surrogate as personal estate, one moiety to the defendant Stanley A. Banta, and the other to the defendant Hubbell, as executor. There was no appeal from the decree of the surrogate; it was fully executed, and the executor of Charles Edward Banta paid over to the legatees under his will the moiety of the proceeds received by him on the distribution. All this was done in strict accordance with the legal rights of the parties. After the accounting in 1869, there remained in the hands of the executor of Albert Banta the sum of $8,000, proceeds of the personal estate of the testator, which had been invested to produce the annuity given to his widow by the will, and a part of his real estate remained unsold. The executor died in 1870, and the defendant Hubbell was appointed administrator, with the will annexed, of Albert Banta's estate, and as such received the fund of $8,000 referred to, and its accumulations. The legacies to the plaintiffs under the will of Charles Edward Banta have been paid only in part. Their testator left no property at his death, except what he was entitled to under the will of his father, and to pay the plaintiffs' legacies will require the application of his entire interest in that estate. It does not appear that there are any debts existing against either testator. Under these circumstances it was the plain right of the plaintiffs that the real estate of Albert Banta remaining unsold should be sold, and that a moiety of the proceeds, together with one-half of the fund in the hands of his administrator, should be paid to the executor of Charles Edward Banta, and applied in payment of their legacies. This, substantially, was the relief awarded to the plaintiffs by the judgment in this action, and the judgment should be affirmed, unless the plaintiffs were concluded by the decree of the surrogate, made in 1871, on the accounting by the defendant Hubbell as administrator with the will annexed of the estate of Albert Banta. This accounting was had on his application, before the successor of the surrogate, who made the decrees on the accountings by the executor in 1867

and 1869, and Stanley A. Banta and the defendant Hubbell, as executor of Charles Edward Banta, were made parties. The surrogate, by his decree, adjudged, in substance, that there was no conversion of the real estate of Albert Banta under his will, and that Stanley A. Banta, as residuary devisee and legatee under the will of Charles Edward, was entitled to the one-half of the real estate of Albert Banta remaining unsold, and to one-half of the proceeds of what had been sold by his executor, and that the decrees of the former surrogate were erroneous in awarding to the executor of Charles Edward any portion of the proceeds of such sales, and to correct this alleged error he directed that Charles Edward Banta's share of the personal estate of Albert Banta, then in the hands of Hubbell, as administrator, should be paid to and retained by him as trustee of Stanley A. Banta, under the will of Chales Edward Banta, in satisfaction, *pro tanto*, of the proceeds of real estate of Albert Banta, paid under the former decrees to the executor of Charles Edward. From this decree no appeal was taken. The defendant Hubbell refused to appeal therefrom, or to allow the plaintiffs to appeal in his name, although they offered to indemnify him against the costs of the appeal.

We are of opinion that the decree does not conclude the plaintiffs. The fund before the surrogate for distribution, when the decree was made, was derived from the personal estate of Albert Banta, and not from the sale of real estate. The testator, Albert Banta, by his will, gave his personal estate, in equal shares, to his two sons. The decrees of the former surrogate were final. They adjudged that the proceeds from the sales of real estate were personal property, and directed a distribution upon that theory. They stood unreversed, and were not opened or set aside by the surrogate on the accounting in 1871. The surrogate should not have disregarded them, and his decree charging the share of Charles Edward Banta in the personal estate of Albert Banta then remaining to be distributed, with the sums paid to his personal representatives from the proceeds of his real

estate under the former decrees, was erroneous, and reversible on appeal.

It is unnecessary to determine, assuming that the necessary parties were before the court, whether the surrogate exceeded his jurisdiction in making the decree, as we are of the opinion that Charles Edward Banta's estate was not represented on the accounting in such a sense as to bind the plaintiffs, and conclude them by the adjudications made. The decree was made in a proceeding instituted under section 70, article 3, title 3, chapter 6, part 2 of the Revised Statues, by Hubbell, as administrator of Albert Banta, for the final settlement of his accounts. That section is as follows: "An executor or administrator, after the expiration of eighteen months from the granting of letters testamentary or of administration, may render a final account of all his proceedings to the surrogate who appointed him, although not cited to do so, and may obtain a citation to all persons interested in the estate, to attend a final statement of his accounts; which citation shall be served and published in the manner prescribed in the preceding sections of this title, and thereupon the same proceeding shall be had for a final settlement, and with the same effect, in all respects, as in the case of a settlement at the instance of a creditor." The seventy-first section provides that whenever an account shall be rendered, and finally settled under any of the preceding sections, except the sixty-eighth and sixty-ninth, if it shall appear to the surrogate that any part of the estate remains to be distributed, he shall decree payment and distribution of what shall so remain, among the creditors, legatees, etc., "and in such decree shall settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share; to whom the same shall be payable; and the sum to be paid to each person."

It will be observed that the citation authorized by the seventieth section is to be directed to, and served upon, "all persons interested in the estate," and that the decree of distribution authorized by the seventy-first section is one to be

made upon an accounting had in pursuance of the previous sections of the statute. The persons immediately interested in the accounting of an administrator or executor, or in the distribution of the estate of a decedent by the surrogate, are creditors and next of kin, and in case of a will, legatees. These are the persons, mentioned in the sixtieth section, to whom the citation is to be directed, when the administrator or executor, who has been required to account by the order of the surrogate, applies to have his accounts finally settled.

No specific provision is made in the statute for the service of the citation in the case where a legatee has died before the accounting. But notice of the proceeding is, according to the general rule of law, necessary to bind the interest of the deceased legatee by the decree, and as the legal title to the legacy vests in his personal representatives, service of the citation upon his executor or administrator would ordinarily be sufficient to bind the estate he represents. The plaintiffs were not legatees of Albert Banta. They were legatees under the will of Charles Edward Banta, and Hubbell, as his executor, was made a party to the accounting. The plaintiffs, however, had an interest in the proceeding before the surrogate. The share of their testator in the estate of Albert Banta, was the only source from which their legacies could be paid. It is doubtless true that a decree made on the settlement of Albert Banta's estate, to which the executor of Charles Edward Banta was a party, would, under ordinary circumstances, in the absence of fraud or collusion, conclude them. But the defendant Hubbell was the representative of both estates. So far as the plaintiffs were concerned, the accounting was a proceeding instituted by Hubbell as representative of one estate against himself as the representative of the other estate. It is a familiar principle that a court of equity will require parties having remote interests to be brought in, when necessary to a complete disposition of the matter in litigation (Story's Eq., § 1526), and this, we think, is a case to which this rule applies, and the language of the seventieth section is broad

Statement of case.

enough to authorize the legatees of Charles Edward Banta to have been made parties to the accounting.

To give conclusive effect to the decree of the surrogate, against the plaintiffs, is not consistent with general principles. In equity Hubbell was the trustee of the estate of Charles Edward Banta, and the plaintiffs were *cestuis que trust*, and had the beneficial interest. They ought not to be concluded by a proceeding instituted by himself, against himself, in which they were interested. We are of opinion that the decree of the surrogate is not conclusive upon them, and is no obstacle to their maintaining this action.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

HIRAM DUFFANY, Respondent, *v.* SAMUEL FERGUSON, Appellant.

Defendant sold and assigned to plaintiff a legacy. In an action to recover damages, upon allegations that the purchase was induced by fraudulent representations, it appeared that defendant represented, in substance, that the legacy was as good as a mortgage upon any man's farm, and that plaintiff might inquire. Plaintiff did inquire of persons to whom he was referred by defendant, who stated the legacy to be good. Its value depended upon the question whether it was charge able upon the testator's real estate. The personal estate was insufficient, but both real and personal more than sufficient to pay it. An attorney, at the request of the parties, examined the will and gave his opinion that the legacy was good. In an action subsequently brought to obtain a construction of the will it was adjudged that the legacy was not a charge on the real estate. The court was requested to charge, in substance, that what was said by defendant was under the circumstances but an expression of opinion. The court refused so to charge, and submitted that question to the jury. *Held*, error; that defendant made no false statements of facts, and what he said could have been only an expression of opinion.

It appeared that defendant had been informed, prior to the sale, by one of the executors that an action for a construction of the will was about to be commenced, and that he did not disclose this to plaintiff. *Held*

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(FOLGER, and EARL, JJ., dissenting), that the judgment could not be sustained on the ground of a fraudulent concealment, although the action might have been maintained thereon, as this did not remedy the error in the refusal to charge, under which the jury may have held the representations made were fraudulent, and so have determined the case.

(Argued February 22, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was for fraud. Defendant's counsel requested the court to charge "that the defendant, if he told the plaintiff that the legacy was good, or he believed it to be good, whichever expression he used, that in either case under the circumstances, without reference to this will, it was a mere matter of opinion, upon which the charges of the complaint in this case cannot be supported."

The court responded: "If the jury are satisfied that he only expressed an opinion, why then he is not liable for the expression of that opinion."

Said counsel then requested the court to charge "that it is, under the circumstances, but the expression of an opinion, and could be nothing else."

The court answered: "That is for the jury to determine."

Said counsel excepted to the refusal of the court to charge that it was a matter of opinion.

Geo. N. Kennedy for the appellant. Defendant's statement to plaintiff concerning the legacy was simply the expression of an opinion, and his motion for a nonsuit should have been granted. (*Oberlander* v. *Spéiss*, 45 N. Y., 175; *Meyer* v. *Meyer*, id., 169; *Hubbell* v. *Meigs*, 50 id., 480, 488, 489; *Marsh* v. *Falker*, 40 id., 562, 566, 567; *Weed* v. *Case*, 55 Barb., 535; *Ellis* v. *Andrews* 56 N. Y., 83; *Simar* v. *Canaday*, 53 id., 293.)

D. Pratt for the respondent. The motion for a nonsuit was properly denied. (2 J. Ch., 622; 47 Barb., 268; *Castle* v. *Noyes*, 14 N. Y., 329.)

Opinion of the Court, per MILLER, J.

MILLER, J. This action is based upon the false and fraudulent representations of the defendant, made with the intent to deceive and defraud the plaintiff. To sustain such an action it must not only be proved that the representations made were false in fact, but that the party who made them had, at the time, reason to believe that they were false. (*Oberlander* v. *Spiess*, 45 N. Y., 175; *Meyer* v. *Amidon*, id., 169.) The representations made by the defendant, and proved upon the trial, were to the effect and in substance that the legacy which was purchased by the plaintiff was good; that it was as good as a mortgage on any man's farm, and was accompanied by a declaration that the plaintiff could inquire about it. The proof also showed that inquiry was made accordingly of an attorney; an examination made of the will, bequeathing the legacy, at the surrogate's office, by him and the parties, and an opinion expressed that it was good. An inquiry was also made of another person, whose name was suggested by the plaintiff, who also concurred with the view, which had been expressed as to the legacy being good.

Whether the representations thus made were true or false, they involved a question of law as to the land of testator being chargeable with the legacy. In regard to this, each of the parties had no special knowledge, and were equally qualified to judge. It was, at most, a matter of opinion which could only be determined by an adjudication of a competent court. The evidence certainly does not establish that the defendant ever represented, or that he believed that the personal estate of the testator alone was chargeable with the legacy, or that it was sufficient to pay the same; and although it subsequently appeared that the court held, in an action to construe the will, that the legacy was not a charge upon the real estate, there is nothing in the case to show that the defendant had knowledge that any such decision would be made. From the nature of the case such an inference is irrational, as it could not have been known at the time that any such representation was false, or that it was believed to have been false. A legal decision, adverse to an opinion

expressed, cannot establish fraud for which a party can be held liable in an action. Knowledge of facts is one of the essential elements upon which fraud is predicated, and when a person does not know, and from the circumstances existing, it is entirely apparent cannot know, and in fact it would be impossible for such person to have such knowledge, it would be doing violence to the principle upon which an action for fraud and deceit is founded to hold that he is responsible. In cases where there is a want of knowledge, representations made are considered as but an expression of the conviction and of the opinion of the person who makes them, rather than a positive affirmation of a fact, and are not necessarily fraudulent, although entirely erroneous. Fraud cannot be proved by showing that statements thus made as expressions of opinion and belief, founded upon the judgment or information derived from others, are false. It must be shown, as already stated, that the person knew them to be false at the time. (*Marsh* v. *Falker*, 40 N. Y., 562; *Hubbell* v. *Meigs*, 50 id., 480.) When, therefore, such person could not have possibly known the falsity of the statement, there could not be any fraud. As the conclusion is irresistible that the defendant made no false statements of facts, and that what he did say as to the legacy being good was merely an expression of an opinion (*Simar* v. *Canaday*, 53 N. Y., 298), the judge was clearly wrong in refusing to charge, as requested by the defendant's counsel, that what was said by the defendant under the circumstances was but the expression of an opinion, and could be nothing else. This opinion involved a question of law, and it did not answer the request made for the judge to say that it was for the jury to determine.

The opinion of the General Term upon the appeal in this case, which sustains the judgment of the trial court, is based upon the fraudulent concealment from the plaintiff of the intention of the executors to bring a suit to determine whether the legacies were a charge upon the real estate. There was no allegation in the complaint in regard to this branch of the case; but it may very well be that a recovery might have

been had upon this ground upon the evidence presented. The difficulty, however, is, that as the court refused to charge in accordance with the request stated, the jury may have determined the case for the reason that the representation made was fraudulent. This would have been erroneous if the views already expressed are correct; and we are not, therefore, authorized to consider the question whether the judgment can be upheld upon the ground that there was a fraudulent concealment.

As the plaintiff was not a party to the action brought by the executors for a construction of the will, and had no opportunity to defend the same and protect his rights, it is not apparent how he could be affected by a decision of that case. The question, therefore, remains open and undetermined so far as he is concerned as to the legacy being a charge upon the real estate. It was not distinctly raised upon the trial, but may, perhaps, be considered as presented upon the motion made by the plaintiff for a nonsuit, although this specific ground was not there stated. It is by no means conclusive from the authorities to which we have been referred, that the legacy was not such charge; but as a new trial must be granted, upon the ground already stated, the decision of that question upon this appeal is not required.

It is proper to suggest that the charge of the judge to the effect that if the conclusion of the jury was favorable to the plaintiff he would be entitled to recover the amount of the legacy, after deducting the payments which had been made upon the same, was not applicable to the case. The action was for fraud, and the true measure of damages would be the difference between the value of the legacy as represented and as it actually was. This value might depend upon circumstances; and hence the difference between the amount of the legacy and the sum received was not the correct criterion. It is true that this portion of the charge was not excepted to, and the question does not directly arise upon this appeal; but as a new trial must be had, it is not out of place, in that point of view, to refer to this aspect of the case.

Opinion of the Court, per *Curiam*.

The judgment must be reversed and a new trial granted, with costs to abide the event.

CHURCH, Ch. J., ALLEN and RAPALLO, JJ., concur; FOLGER, and EARL, JJ., dissent; ANDREWS, J., took no part.

Judgment reversed.

Upon a subsequent motion for reargument, the following opinion was delivered.

Per Curiam. The conclusion which was reached upon the principal question arising upon this appeal would seem to follow from the course of reasoning in the opinion, and the judges who concurred in the same see no occasion to change their views, after a careful consideration of the points presented upon this motion for reargument. They are of the opinion that the additional authorities which have been cited do not affect the question discussed and while they might be applicable where the alleged fraud related to a false representation as to a fact, they are not in point in reference to an opinion upon a question of law in regard to which both parties enjoy the same opportunities, and are equally capable of arriving at a correct conclusion. But while they think that the judge was in error in refusing to charge as requested in reference to the opinion expressed, it by no means follows that the case must be disposed of entirely upon that question. It would not have been inconsistent with the views expressed in the opinion, and the judge might very properly have qualified his refusal to charge, by saying that the pleadings might be considered as amended to meet the proof, and in that state of the case, if the defendant had fraudulently concealed from the plaintiff, information which he had as to the intention of the executors to bring an action to determine whether the legacies were a charge upon the real estate, and such concealment would have affected the plaintiff by preventing him from entering into the contract for the purchase of the legacy, that then a case of fraud was made out, and the plaintiff was entitled to recover. This would have presented

Opinion of the Court, per *Curiam*.

the question upon which the General Term sustained the judgment, and perhaps the real question in the case, to the consideration of the jury, in as favorable a light for the plaintiff as was warranted by the evidence. In regard to the charge upon the question of damages, it is proper to say that it was not discussed upon the hearing of the appeal, and if the case was tried upon the hypothesis that the contract was rescinded, it may well be that the rule laid down in the charge was correct. As no exception was taken to the charge in this respect, the question is not presented, and the remarks made were not called for. So also the question as to the legacy being a charge upon the real estate was not in the case. The observation made as to this as well as the point preceding the last, were mere suggestions thrown out in reference to a new trial, and should not be considered as controlling or decisive.

It may also be observed that the opinion upon the principal question considered, only expressed the views of two of the members of the court, two others having concurred in the result, two dissented, and one did not take any part.

It is apparent from what has already been remarked, that this is not a case for a reargument. We have deemed it proper however to make the explanation already stated as to the opinion, so that no further misapprehension may exist when a new trial takes place.

Motion for reargument denied, without costs.

All concur.

Motion denied.

Statement of case.

George McRea, Respondent, v. The Central National Bank of Troy et al., Appellants.

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The criterion of a fixture is the union of these three requisites: First. Actual annexation to the realty or something appurtenant thereto. Second. Application to the use or purpose to which that part of the realty to which it is connected is appropriated. Third. The intention of the party making the annexation to make a permanent accession to the freehold.

The rule prescribed by the Revised Statutes (2 R. S., 83, §§ 6, 8), which, where property is annexed to the freehold, as between the personal representatives and the heirs of a deceased person, makes the mode of annexation the test by which to determine whether it is personal or real property, is not controlling in cases between vendor and vendee.

In such cases the purpose of the annexation and the intent with which it was made are the most important considerations.

If the article is attached for temporary use, with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor; but if attached for the permanent improvement of the freehold, he may.

Where the character of property as personalty or realty is not fixed, but depends upon the intention with which it was annexed to the freehold, the conduct of the party by whom it was annexed is proper to be shown and important as throwing light upon the intention.

Plaintiff erected upon his premises a building specially adapted for a twine factory and for the purpose of holding the machinery used in the business of manufacturing twine, which, being very heavy, required extra strength in the building. He placed therein the requisite machinery. Each machine was fastened to the floor by bolts, nails or cleats, and was attached to the gearing. Most of the machines were complete in themselves, could be removed without material injury to them or to the building, and could be used in any other building having strength to support and power to run them, but would be of less value if taken out and sold than if they remained as part of the factory. Plaintiff carried on the business for some years, when he contracted to sell, describing the property in the contract of sale as the real estate situate in J., viz., the twine factory, etc., together with all the machinery, etc., the whole being sold for a gross sum. He executed a conveyance describing the land only, and took back a mortgage with the same description. The lands and buildings, without the machinery, were worth much less than the amount of the mortgage. In an action to restrain judgment creditors from selling the machinery on execution as personal property, these facts appeared, and plaintiff testified that the machines were placed in the building for permanent use. *Held* (Allen, Andrews and Earl, JJ., dissenting), that the evidence was sufficient to justify a finding that the original intent of annexation was to make the

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machinery permanently a part of the freehold; that as between the parties the machines were fixtures, and so covered by the mortgage; and that plaintiff was entitled to the relief sought.

Also, *held*, that it was immaterial upon the question of intent that plaintiff, at the request of the grantee, after execution of the deed, executed also a bill of sale of the machinery, tools and fixtures.

Murdock v. *Gifford* (18 N. Y., 28); *Hellowell* v. *Eastwood* (6 Exch. [W., H. & G.], 295); *Walker* v. *Sherman* (20 Wend., 636); *Vanderpoel* v. *Van Allen* (10 Barb., 157) distinguished.

(Argued March 31, 1876; decided September 19, 1876.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a decision of the court at Special Term.

This action was brought by plaintiff as mortgagee, and claiming under a mortgage upon real estate against defendants, who are judgment creditors of the mortgagor, and the sheriff holding executions, issued on their judgments, to restrain them from selling on said executions certain machinery advertised to be sold as personal property, which plaintiff claimed to be part of the realty.

The premises were formerly owned by plaintiff, and he erected thereon a building as a twine factory, specially adapted for the machinery used in the business of manufacturing twine, and placed therein the machinery in question, as he testified, "for permanent use." The machinery consisted of the various machines necessary for and adapted to that business. The plaintiff carried on the business of manufacturing twine for several years, using the building and operating the machinery.

On the 14th day of November, 1872, he contracted to sell the premises to one George Catlin for $28,000. The contract described the property as follows:

"All that real estate situated in said Johnsonville: First, the twine factory and flax mill, and blacksmith shop, bounded as follows: * * * together with all the machinery, tools and fixtures belonging to the party of the first part, and all water privileges deeded to him on his purchase of said real estate."

On the 1st day of January, 1873, the premises were con-

veyed by McRea to Catlin by two deeds, and a mortgage executed and delivered back by Catlin to McRea for $21,100, the balance of the purchase-money.

The deeds and mortgages were drawn by a Mr. Merrill. After they were finished Mr. Catlin read over the deeds, and saw no mention was made of the machinery, and asked McRea if he did not intend that should pass. To this McRea replied he did. Mr. Merrill then suggested that the "easiest way" or the "best way" to fix it was to make a separate bill of sale, which was done. No separate mortgage of the machinery was taken. Some time after this, in January, 1873, Catlin conveyed one-half of the premises to Christopher A. Banker, and also gave to him a bill of sale for one-half of the machinery. Defendant The Central Bank of Troy recovered judgment against Catlin & Banker, and issued executions to the defendant Quackenbush, as sheriff, who seized upon the property described in the complaint.

The action seeks to restrain that sale.

The court found, in reference to the character of the machinery, as follows:

"That the machinery mentioned and enumerated in the complaint and located in the twine mill, were and are fixtures and part of the freehold conveyed by the plaintiff to George O. Catlin, and is not personal property; and as facts showing that these are fixtures, I further find (*a*) that the building in which the machinery was erected for the purpose of a twine factory, and the manufacturing specially adapted to it and used with it; (*b*) that the original intention of annexation was to make this machinery permanently a part of the building and this freehold; (*c*) that the mortgage under which the plaintiff claims title, was to secure to him the payment of the purchase-money of the premises described therein, and was taken by him and given to him with the intention of holding the machinery in question as part of the realty and not as personal property."

And as conclusion of law, that plaintiff was entitled to the relief sought.

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Upon a settlement of the case the following additional findings were made:

"That a small part of the machinery, mentioned in the complaint, was, before the present twine mill was built, used by the plaintiff in an old wooden mill for the purpose of manufacturing twine, and that such old wooden mill was, prior to its use as such twine mill, used as a paper mill. That the rest of said machinery was manufactured in Scotland, purchased there by the plaintiff, imported in sections and put together in said mill."

The court was requested to find: "That each of the machines mentioned in the complaint, with the exception of the two 'iron softeners,' was a machine complete in itself, which received no support from the walls, ceiling or roof of the building, and would operate with the proper power applied to it wherever it was placed."

The court so found, with the addition of the words, "but the several machines were attached to the building by nails, bolts and cleats, and the gearing and shafting."

The court found: "That all the machines mentioned in the complaint could be taken apart without injury to themselves or to the building in which they were placed, except such injury as would result from the loosening of the fastenings, and could, without injury, be put together again and operated in any place where there was sufficient room for them to stand, and where the necessary power could be applied. That each of these machines, with the exception of the iron softener above mentioned, stood upon the floor of the mill, and was not in any manner attached to or supported by the walls or ceiling, and that it was, in each case, operated by a belt actuated by the gearing of the mill and passing over a pulley on the machine, and that it was not connected with the gearing in any other way."

"That none of said machines, with the exception as aforesaid of the said two iron softeners, were ever in any manner attached or fastened to the building except as hereinafter stated, to wit: Some of the machines were, before the sale

by plaintiff to Catlin, fastened to the floor at the end where the belt went on, by angle bolts made for the purpose, which held the feet of the machines to the floor. These bolts went down through the floor and were held by nuts screwed on below the floor. Other machines were held by nails of a similar construction — that is, the upper part bent over the foot of the machine, while the lower part was driven into the floor. Others were held by common nails, and one or two by cleats of wood nailed down on each side of the machine; they were also attached to the gearing."

The court was requested to find: "That whenever these bolts, nails or cleats were used they were placed only at the end of the machine where the pulley was located, and they were placed there for the purpose of steadying the machine, and preventing it from being moved or lifted by the action of the belt." The court so found — but added thereto the words, "but I do not find that that was the only purpose."

The court also found, that there were tools and machinery in the mill or factory, other than those enumerated in the complaint. Further facts appear in the opinion.

Esek Cowen for the appellants. The court erred in receiving the testimony of Richmond, who drew the agreement between plaintiff and Catlin, as to what they stated in reference to the kind of security McRea should have. (*Blossom* v. *Griffin*, 13 N. Y., 573; *Pollen* v. *Leroy*, 30 id., 549; *Hale* v. *Omaha Bk.*, 49 id., 626.) The machinery was not a part of the real estate as between the mortgagor and mortgagee. (*Potter* v. *Cromwell*, 40 N. Y., 287; *Vanderpoel* v. *Van Allen*, 10 Barb., 157; *Murdock* v. *Gifford*, 18 N. Y., 28; *Voorhees* v. *McGinnis*, 48 id., 278.)

R. A. Parmenter for the respondent. The machinery was real estate. (*Haskin* v. *Woodward*, 45 Penn., 42; 2 W. & S., 116, 390; *Walker* v. *Sherman*, 20 Wend., 636; *House* v. *House*, 10 Paige, 158; *Hovey* v. *Smith*, 1 Barb., 372; *Laflin* v. *Griffiths*, 35 id., 58; *Bishop* v. *Bishop*, 1 Kern., 123, 127;

Goodrich v. *Jones*, 2 Hill, 142; *Tabor* v. *Robinson*, 36 Barb., 483; *Snedeker* v. *Warring*, 2 Kern., 170; 24 N. J. Eq., 260; 10 Kan., 314; 4 Daly, 359; 18 N. Y., 28; 40 id., 287.)

Rapallo, J. The court found as facts that the articles of machinery described in the complaint were fixtures and part of the freehold, and as facts showing that they were fixtures: First, that the building in which the machinery was, was erected for the purpose of a twine factory, and the machinery specially adapted to it and used with it; second, that the original intention of this annexation was to make this machinery permanently a part of the building and the freehold; and, third, that the mortgage under which the plaintiff claims title was to secure to him the payment of the purchase-money of the premises described therein, and was taken by him and given to him with the intention of holding the machinery in question as part of the realty, and not as personal property.

In supplemental findings made at the request of the defendants and inserted in the case on settlement, the court found as further facts, that each of the machines, except two, was a machine complete in itself, which received no support from the walls, ceilings or roof of the building, and would operate, with the proper power applied to it, wherever it was placed, and that all the machines could be taken apart without injury to themselves or to the building in which they were placed, except such injury as would result from the loosening of the fastenings, and could, without injury, be put together again and operated in any place where there was sufficient room for them to stand and where the necessary power could be applied. That none of the machines, except the two iron softeners, were attached to the building except as follows: Some of them were fastened to the floor at the end where the belt went on, by angle bolts made for the purpose, which held the feet of the machines to the floor; these bolts went down through the floor, and were held by nuts screwed on below the floor. Others were held by nails of similar construction; others by common nails, and one or two by cleats of wood;

nailed down on each side of the machine; they were also attached to the gearing. That the bolts, nails and cleats were so placed for the purpose of steadying the machines and preventing them from being moved or lifted up by the action of the belt. But to this finding the court added that that was not the only purpose.

On these findings, assuming them to be sustained by evidence, I think it clear on all the authorities cited, that the conclusion that, as between the present parties, the machines were fixtures and part of the freehold was correct. The rule declared by statute (2 R. S., 83, §§ 6 and 7), as between the personal representatives and the heirs of a deceased party, is not controlling in cases between vendor and vendee. (*Potter* v. *Cromwell*, 40 N. Y., 287; *Voorhees* v. *McGinnis*, 48 id., 278; *House* v. *House*, 10 Paige, 158.) That enactment makes the mode of annexation the test whether the property retains its character of personalty, and gives to the executor or administrator things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support. But, as between vendor and vendee, the mode of annexation is not the controlling test. The purpose of the annexation, and the intent with which it was made, is in such cases the most important consideration. The permanency of the attachment does not depend so much upon the degree of physical force with which the thing is attached as upon the motive and intention of the party in attaching it. If the article is attached for temporary use with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor. If it is placed there for the permanent improvement of the freehold he may. (*Crane* v. *Bingham*, 3 Stockton, N. J., 29; *Potter* v. *Cromwell*, 40 N. Y., 296, 297.) The mode of annexation may, it is true, in the absence of other proof of intent, be controlling. It may be in itself so inseparable and permanent as to render the article necessarily a part of the realty, and in case of less thorough annexation the mode of attachment may afford convincing evidence that the intention was

that the attachment should be permanent; as, for instance, where the building is constructed expressly to receive the machine or other articles, and it could not be removed without material injury to the building, or where the article would be of no value except for use in that particular building, or could not be removed therefrom without being destroyed or greatly damaged. These are tests which have been frequently applied in determining whether the annexation was intended to be temporary or permanent, but they are not the only ones, nor is it indispensable that any of these conditions should exist. In the case of *Potter* v. *Cromwell* (40 N. Y., 287), before referred to, this court, after a full examination of the numerous authorities, gave its approval to the criterion of a fixture as stated in *Teaff* v. *Hewitt* (1 McCook, 511), viz.: The union of three requisites First. Actual annexation to the realty or something appurtenant thereto. Second. Application to the use or purpose to which this part of the realty with which it is connected is appropriated. Third. The intention of the party making the annexation to make a permanent accession to the freehold. By the application of that criterion this court, with only one dissenting voice, decided that a portable grist-mill for grinding flour, placed in a building which had been used as a tannery, and was provided with steam power previously placed in the building to grind bark for the tannery, became part of the freehold, as between a judgment creditor and a purchaser of the realty. It was found by the referee that the grist-mill was placed there by the owner of the realty for the purpose of being used as a permanent structure for a custom grist-mill for the neighborhood, and on that ground it was held by this court to have become part of the realty, notwithstanding the fact that it was not attached to the walls of the building, but annexed, as in the present case, only to the floor. It had been built elsewhere, and was constructed in such a manner as to be readily taken apart without injury to itself or to the building, and moved from place to place. There was a very slight difference in the mode of annexation from that in the present case, to wit: That to support the

floor, upright posts were placed under it resting on the cellar floor, while in the present case the building was constructed expressly for the purpose of receiving machinery of the description which was placed there, and of sufficient strength to render additional support unnecessary, although, in the present case, some of the machines weighed three or four times as much as the portable grist-mill. The case of *Murdock* v. *Gifford* (18 N. Y., 28), which is mainly relied upon by the appellant here, was distinguished by showing that, in that case, not only was there an entire absence of any finding that the looms were placed in the building and attached thereto for the purpose of becoming a permanent part of it, but that that fact was expressly negatived by the finding that the attachment was for the sole purpose of keeping them steady in their places — a fact which the court, in the present case, although requested expressly, refused to find. Numerous other cases are referred to, where, notwithstanding similar attachments, the property was held to be personalty; but it appears that in all these cases the object of the attachment excluded the intention of rendering them permanent fixtures. The object, and not the method of the attachment, appears to be considered the controlling feature. "The principles applicable as between vendor and purchaser must vary with the varying circumstances of each case. The question of intention enters into and makes an element of each case. The circumstances are to be taken into account to show whether the erections were made for the permanent improvement of the freehold or for the temporary purposes of trade." (*Farrar* v. *Chauffetete*, 5 Denio, 527.) These principles are recognized in the case of *Voorhees* v. *McGinnis* (48 N. Y., 278). The annexation in that case, it is true, was of a much more complete character than in the present case, or in that of *Potter* v. *Cromwell* (40 N. Y., 287), but the intention of the parties in making the annexation is recognized as one of the tests, and it is conceded that the circumstance that the machinery may or may not be removed without injury to the building or to itself is not now deemed

to be controlling, and Washburn on Real Property (vol. 1, p. 8) is cited, in which the author says: "It may be stated that whether a thing which may be a fixture becomes a part of the realty by annexing it depends, as a general proposition, upon the intention with which it was done."

That the machinery in question was adapted to the use for which the building was constructed is conceded, and, without further pursuing the authorities, I will briefly refer to those cited in the opinion of my learned brother, Allen, J., in support of the proposition that these were not fixtures. *Hellawell* v. *Eastwood* (6 Exch. [W., H. & G.], 295) was a case between landlord and tenant. The alleged fixtures, presumably, were put in by the tenant, as they were distrained for rent. The object and purpose of the annexation was stated by the court not to have been to improve the inheritance, but merely to render the machines steadier and more capable of use as chattels.

Walker v. *Sherman* (20 Wend., 636) was partition, and although the machines in dispute had been for many years in the building, the difficulty was that they were not affixed or fastened to the building in any manner, and the commissioners treated them as personalty; but other machinery in the same factory, which was fastened to the building, was treated as realty. (See pp. 637, 638.) This case holds, in respect to machinery, that the two characteristics of adaptation to the enjoyment of the realty and annexation to it must concur; but that where the former characteristic is present, the slightest fastening will be sufficient to constitute annexation. (See pp. 651, 653, 655.) It is enough that it is permanently or habitually attached. In *Vanderpoel* v. *Van Allen* (10 Barb., 157) the machines merely stood upon the floor, without being attached in any way, except by the belts which were used for motion and not for fastening, except as to some of the pieces, in respect to which cleats were used to make them stand level, and there was no evidence of any intention to make them part of the freehold, but all the facts tended to the contrary. *Murdock* v. *Gifford* (18 N. Y., 28) has already been referred

to, and only establishes that the mode of attachment shown in that case was not of itself sufficient to make the machines fixtures, where the purpose of the attachment was solely for the more convenient use of them as chattels, and in the absence of any intention that it should be permanent.

The finding of the court that, in the present case, the original intention of the annexation was to make the machinery permanently a part of the building is not, I think, unsupported by evidence. The building was proved to have been erected especially for the purpose of a twine factory, and with reference to holding this description of machinery. The machines were of great weight, many of them weighing from one to four tons. They were all permanently fastened to the floor of the building, and it is conceded that they were adapted to the purposes for which the building was erected. The plaintiff testified that they were placed there for permanent use. The fair interpretation of this evidence is, that they were placed there for permanent use in that building; they constituted part of the twine factory, and about two-fifths in value of the entire establishment; and it appeared in evidence that although they were capable of removal they would be of less value if taken out and sold than if they remained where they were, as part of the factory. From this evidence the court was, I think, justified in finding that they were intended as a permanent part of the structure, quite as much so as the portable grist-mill in the case of *Potter* v. *Cromwell* (40 N. Y., 287). The dealings between the plaintiff and his vendee, also, showed that they were regarded as fixtures which passed with the land; and although, if the property had in its own nature a determinate legal character, either as realty or personalty, the manner in which the parties treated it would not change that character; yet when, as in this case, the character of the property is not so fixed, but depends upon the intention with which it was annexed, the conduct of the party who annexed it has an important bearing, as throwing light upon that intention. He evidently understood that it was part of the realty, which he could not have done if he had

placed it on the premises for temporary use merely, and with the intention that it should remain personalty. When contracting for the sale of the property, he described it as the real estate situate in Johnsonville, viz., the twine factory and flax mill, etc., etc., with the machinery, etc., and sold the whole for a gross sum of $28,000. By this contract he includes the machinery under the general head of real estate, and in fulfillment of that contract he tendered a conveyance describing the land only, and took back a mortgage for $21,000 of the purchase-money, describing the land only, although the land and buildings, without the machinery, were worth a much less sum than the amount of the mortgage. The fact that at the request of the purchaser he afterwards executed a supplementary bill of sale is not of much significance. It is found by the court that there were some tools and machinery which were loose and are not claimed in the action. The bill of sale also includes fixtures, which necessarily passed with the deed. It was not a necessary instrument, as whatever was personalty would have passed by delivery; but it was probably given because it conformed to the intention of the plaintiff and was a simple confirmation of what he believed he had already done, and was requested by the purchaser or his adviser.

After it has been so repeatedly declared by the courts that the character of articles of the description now in controversy attached to a building, whether they are to be regarded as realty or personalty, is to be determined by the intent of the party attaching them, it would be peculiarly unjust to depart from that doctrine in a case like the present, where the owner of the land and buildings, who himself made the annexation, and necessarily knows the intent with which it was made, afterwards sells the whole establishment and takes for the purchase-money a mortgage manifestly intended to cover all the property sold, but which would be a totally inadequate security if the property which he had annexed were not treated as a part of the realty. There can be no equity in such a case in favor of a mere judgment creditor of the vendee, as against the mortgagee.

Dissenting opinion, per Allen, J.

On the whole case I think the findings of fact are sustained by evidence, and that the decision of the court below should be affirmed, with costs.

Folger, J. I think that, either from the evidence or the findings, the grantor and mortgagee placed the machinery in the building for a permanent purpose and for the better enjoyment of his estate (*Walmsley* v. *Milne*, 7 C. B. [N. S.], *115); that there did concur actual annexation of the machinery; applicability to the use to which that part of the real estate was appropriated, with which it was connected; and an intention of making the annexation so as to make a permanent accession to the freehold. (*Hoyle* v. *P. and M. Railroad*, 54 N. Y., 314, 324.)

I therefore concur in the opinion of Rapallo, J.

Allen, J. (dissenting). The question presented by this appeal is, whether the plaintiff, as mortgagee of real property, or the defendants, as execution creditors of the mortgagor, has the better legal right to hold the machinery mentioned in the pleadings as security for their respective debts. The property in controversy is in its nature personal, subject to a levy and sale upon execution, and would not ordinarily pass under a conveyance or mortgage of realty. It can only be classed with, and treated as, a part of the realty upon which it may be or in connection with which it is used by annexation thereto, either actual or constructive. It belongs to that class of property which, under some circumstances, may be annexed to real property and become what is known in the law as a fixture, so as to pass under a conveyance of the lands and as part of them, in conformity with the maxim, "*Quicquid plantatur solo, solo cedit.*" Whether a chattel has, by annexation, become a part of the realty depends upon circumstances, and very much upon the intent of the party by whom the annexation has been made, as such intent can be gathered from what is said and done at the time — the character of the chattel and the purposes for and the manner in

which the annexation is made. If the chattel is not a necessary accessory to the building, and is placed in position merely for the purpose of using it for manufacturing or trading purposes, and not with a view to the permanent benefit of the realty, it will not, ordinarily, become a part of the realty. Where the object of affixing the chattel to the freehold is for its more convenient use as a chattel, as shown by its nature and the use to which it is put, it will retain the character which it had before it was annexed. The law of fixtures has been the subject of much discussion in the courts and by elementary writers, and any attempt to reconcile the views of judges or commentators, or to deduce from them any fixed or certain standard or rule by which to determine whether, in any given case, a chattel has lost its character as such and become a part of the freehold, would be vain. So a discussion at any length of the general principles of the law of fixtures, or a review of the authorities, would not be profitable, in view of all that has been written upon the subject. We are relieved from the necessity of a consideration of the general rules applicable to this branch of the law by adjudications heretofore made, which have, in this State at least, become a rule of property, and cannot properly be disregarded by us, and which are decisive of the questions involved in this appeal. The chattels and machinery, the subject of the controversy in this action, were not so annexed to the building as to become a part of it, or necessary to its support, but they were susceptible of removal without material injury to themselves or the realty. The only fastenings were such as were required to keep the machinery steady while in operation. The fastenings were only for that purpose, and the only connection with the motive power and other permanent machinery was by bands and straps, by means of which it was operated. It was not a part of, or necessary to, the stationary and permanent machinery. It was not peculiarly fitted for, or adapted to, the building in which it was, but was equally capable of being used in any other building having strength to support it, and motive power for its operation. It was of the same general

character of machinery as was used for the same purpose elsewhere, and its value was not impaired by removal.

The mortgage under which the plaintiff claims, follows the grant by the plaintiff to the mortgagor and is of the realty described by metes and bounds without mention of the machinery. The evidence that the purchase by the mortgagor of the plaintiff was of the lands together with the "machinery, tools and fixtures" belonging to the vendor, for a sum in gross, does not tend to prove that the machinery, any more than the tools, was a part of the realty. On the contrary, the fact that both are mentioned independently and separately is some indication that it was supposed neither would be included in the sale of the lands without express mention. Aside from the evidence admitted under objection, of the purpose and intent of the plaintiff to take security upon the machinery, fixtures and tools, as well as the land, which we think was incompetent, there was no evidence that the plaintiff at the time he put the machinery in the mill had any intent other than to use it for the purposes to which it was adapted so long as it should be convenient or profitable, or that he intended to connect it permanently with the realty with a view to enhance its value. In other words, there was no evidence to justify a finding that the machinery was put in the building except for use as a chattel. If the property in controversy was not described in the mortgage or covered by it as a part of the property mentioned and described therein, the purpose and intent of the mortgagee could not vary the legal effect of that instrument, or make it operative upon property not within its terms. The case is clearly within the principle, and cannot be distinguished from several well considered cases, in which the question has arisen between owners or mortgagees of the freehold and creditors. In *Hellawell* v. *Eastwood* (6 Exch. [W., H. & G.], 294), it was adjudged, that machinery for the purpose of manufacture (*i. e.*, mules used for spinning cotton), fixed by means of screws, some into the wooden floors of a cotton mill and some by being sunk into the stone flooring and secured by

molten lead, were distrainable for rent. Fixtures are not the subjects of a distress for rent. In *Walker* v. *Sherman* (20 Wend., 636), machinery in a woollen factory, consisting of carding machines, picking machines, looms, etc., although used for eleven years or more, and passed from one owner of the factory to another as parts of the factory, were treated as personal property and as not belonging to the realty by commissioners in partition, and their decision and action was affirmed by the Supreme Court upon an elaborate review of all the authorities bearing upon the question. In *Vanderpoel* v. *Van Allen* (10 Barb., 157), the question was between mortgagees of the realty and judgment creditors of the mortgagors who had levied upon the machinery in a cotton factory and other mills, being the premises mortgaged to the plaintiffs. The machinery in controversy there was the same as that in controversy here, and was placed and fastened to the building substantially in the same manner. It was held by Judge Brown, that the property was not a part of the realty or within the denomination of fixtures, and that the judgment creditors were entitled to a decree dissolving the injunction and establishing their right to the property in dispute. *Murdock* v. *Gifford* (18 N. Y., 28), was also a controversy between mortgagees and creditors, involving the same question, and it received the same solution as in *Vanderpoel* v. *Van Allen* (*supra*). Cases have been since decided in this court distinguished by their circumstances from those referred to, and the circumstances which have been deemed sufficient to take them out of the principles adjudged in *Murdock* v. *Gifford*, are pointed out by the judges pronouncing judgment; but in no case that has come under my observation has the authority of the case last mentioned been questioned. Many other cases in this State, in other States and England, coincide with the rule as stated in *Murdock* v. *Gifford*. There is nothing in this case to distinguish it from that and we are not at liberty, by reason of any supposed equities in favor of either party, to unsettle the law so well established in this State by taking distinctions immaterial

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and without substance for the purpose of arriving at a different result. These machines were not, as said before, fitted to this building and insusceptible of use elsewhere, neither were they accessories necessary to the enjoyment and use of the building in which they were. The learned judge erred in holding that the several articles were fixtures, and the facts found by him in support of such findings, so far as they were authorized by the evidence, were entirely insufficient to make them a part of the freehold.

The judgment must be reversed and a new trial granted.

For affirmance: CHURCH, Ch. J., RAPALLO, FOLGER and MILLER, JJ.; for reversal: ALLEN, ANDREWS and EARL, JJ.

Judgment affirmed.

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DUNCAN McCALL et al., Respondents, *v.* THE SUN MUTUAL INSURANCE COMPANY, Appellant.

The statement in a policy of marine insurance of the ultimate and intermediate *termini* of the voyage, does not prohibit stopping at other intermediate ports, which, by the course of navigation, or the usage of trade, are usually entered in making the insured voyage.

In the absence of words excluding it, the course of navigation prescribed by usage may, and indeed must, be pursued.

Defendant issued a policy insuring the bark L. "at and from Miramichi to a port in Cape Breton, and at and from thence to New York, with privilege of carrying coal," etc. The vessel had previously sailed from the port of departure to Big Glace bay, a port in Cape Breton, under a charter to load with coal, containing a provision that if, on arrival, the captain should not consider it safe to remain and load, he was at liberty to proceed elsewhere, in which case the charter was to be considered canceled. Big Glace bay is exposed to the sea, affording no protection from winds and storms, and it is the usual custom for vessels bound to Big Glace bay for coal, during the fall and winter months, to first stop at Sydney, a port in Cape Breton having a good harbor, first reached on a voyage from Miramichi, and when their masters are notified that the vessels can be loaded, to proceed to the port of lading. This custom was established for the safety of vessels. The L. arrived at Sydney November twelfth; the next day her master went to Big Glace bay, and finding no wharf, concluded it an unsafe place to load and went to Cow bay, another port

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in Cape Breton having a substantial wharf, and there entered into a charter to load with coal for New York, on December twelfth. As soon as her turn to load arrived, the L. sailed to Cow bay, and while loading was driven upon the rocks and injured. In an action upon the policy, *held*, that the vessel, by stopping at Sydney, did not exhaust the privilege given in the policy, nor was it a deviation; that the vessel was free to choose any customary coaling port on the island, and in going to the selected port to make the voyage in the usual and customary manner; that therefore the privilege of the policy was not exhausted by going into Sydney for safe anchorage according to usual custom; also, that the reservation in the first charter of the right to cancel it, made it uncertain what the actual voyage would be, and it could only be made certain when the master should elect to what port of lading he would go, which election was made at Sydney, in the direct course of a voyage to the port selected, so that there was no deviation.

It seems, that if the master had elected, in the first instance, to go to Big Glace bay, and had first gone to that port and then sailed for Cow bay, his privilege under the policy would have been exhausted, as an election once made determines the right.

The mere fact that an insured vessel exists in specie, does not necessarily prevent the insured from claiming a total loss without abandonment. If after encountering a sea peril it is, for that reason, justifiably sold by the master, the insured may claim a total loss, accounting to the insurer for the proceeds of the sale as salvage received for his benefit.

Where the evidence in a case will warrant the jury in finding for the plaintiff on the whole issue, and the court is called upon by the defendant to decide it as a question of law, without requesting the submission of any question of fact to the jury, the finding of the facts by the court instead of by the jury, is not a ground of exception.

McCall v. *Sun Mutual Insurance Company* (7 J. & S., 330) reversed.

(Argued April 13, 1876; decided September 19, 1876.)

Appeal from order of the General Term of the Supreme Court of the city of New York, reversing a judgment in favor of plaintiff entered upon a verdict. (Reported below, 7 J. & S., 331.)

This action was upon a policy of marine insurance. The terms of the policy and the facts appear sufficiently in the opinion.

Albert Mathews for the appellant. The putting into Sidney of the vessel was not such a deviation from the voyage

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as avoided the policy. (*Pelly* v. *Ex. Ins. Co.*, 1 Burr, 341, 351; Smith's Mer. Law [1st Am. ed.], 363; *Reade* v. *Comm. Ins. Co.*, 3 J. R., 358; *Stevens* v. *Comm. M. Ins. Co.*, 26 N. Y., 403; *Noble* v. *Kennoway*, 1 Dougl., 510; *Wadsworth* v. *Pac. Ins. Co.*, 4 Wend., 37; *Col. Ins. Co.* v. *Cattell*, 12 Wheat., 387; *Child* v. *Sun Mut. Ins. Co.*, 3 Sandf., 440; Phil. on Mar. Ins., §§ 119, 133, 138, 1003; *Cormack* v. *Gladstone*, 11 East, 347; *Uhde* v. *Walters*, 3 Campb., 16; *Wallace* v. *Dewar*, 1 id., 503; *Ongier* v. *Jennings*, id., 505; *De Peyster* v. *Sun M. Ins. Co.*, 19 N. Y., 276; *Bond* v. *Nutt*, Cowp., 601; *Salvador* v. *Hopkins*, 3 Burr., 1714; *Gracie* v. *Mar. Ins. Co.*, 8 Cranch, 75; *Kingston* v. *Knibbs*, 1 Campb., 508, note; *Rodocanachi* v. *Elliott*, L. R., 8 C. P., 669; L. R., 9 C. P. Exch., 518; *Maxwell* v. *Robinson*, 1 J. R., 333.) Neither was the delay there a deviation from the voyage insured. (Phil. on Mar. Ins., §§ 1017, 1023; 1 Dougl., 510; 12 Wheat., 38; *Samuel* v. *Royal Ex. Ass. Co.*, 8 B. & C., 119; *Bouillon* v. *Lapton*, 15 C. B. [N. S.], 143; *Ellery* v. *N. E. Ins. Co.*, 8 Pick., 14; *Lapham* v. *Atlas Ins. Co.*, 24 id., 1; Park on Ins. [6th ed.], 68; *Talcot* v. *Mar. Ins. Co.*, 2 J. R., 130–137; 3 Sandf., 48; 3 Burr., 1707; Smith's Mer. Law, 363; *Patrick* v. *Ludlow*, 3 J. Cas., 10; *Lee* v. *Gray*, 7 Mass., 352; *Perkins* v. *Aug. Ins. Co.*, 10 Gray, 316; *Ship Henry Erobank*, 1 Sumn., 424; *Post* v. *Phœnix Ins. Co.*, 10 J. R., 83; *Delany* v. *Stoddart*, 1 T. R., 22; *Graham* v. *Comm. Ins. Co.*, 11 J. R., 357; *Hobart* v. *Norton*, 8 Pick, 159; *De Longuemere* v. *N. Y. F. Ins. Co.*, 10 J. R., 124; *Vos* v. *Robinson*, 9 id., 196; *Lawrence* v. *Ocean Ins. Co.*, 11 id., 241; *Freeman Ins. Co.* v. *Lawrence*, 14 id., 55; *Wheeler* v. *Mar. Ins. Co.*, 38 Supr. Ct. R., 250; *Snow* v. *Col. Ins. Co.*, 48 N. Y., 624.) Plaintiffs are entitled to recover for an actual total loss. (*Farnsworth* v. *Hyde*, 18 C. B. [N. S.], 834; *Bullard* v. *R. W. Ins. Co.*, 1 Curtis, 153; *Crosby* v. *Mut. Ins. Co.*, 5 Bosw. 377; *Wallenstein* v. *Col. Ins. Co.*, 44 N. Y., 217; *G. W. Ins. Co.* v. *Fogerty*, 19 Wall., 645; *Coit* v. *Smith*, 3 J. Cas., 16; *Roux* v. *Salvador*, 3 Bing. [N. C.], 266; *Rosetto* v. *Gurney*, 11 C. B., 187; *Fontaine* v. *Phœnix Ins.*

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Co., 11 J. R., 293; *Robertson* v. *Caruthers*, 2 Stark, 571; *Poole* v. *Pro. Ins. Co.*, 14 Conn., 54; *Brig Sarah Ann*, 2 Sumn., 215; *Peele* v. *Mer. Ins. Co.*, 3 Mason, 40; *Idle* v. *Royal Ex. Ass. Co.*, 8 Taunt., 755; *Fuller* v. *Kennebeck Ins. Co.*, 31 Me., 327; *Charleston Ins. Co.* v. *Cowen*, 2 Gill, 410; *Am. Ins. Co.* v. *Ogden*, 15 Wend., 532; Marshall on Ins., 527; 2 Arnould on Ins., 10, 1092; *Butler* v. *Murray*, 30 N. Y., 100; *Am. Ins. Co.* v. *Center*, 4 Wend., 52; *Prince* v. *Ocean Ins. Co.*, 40 Me., 488; 2 Phil. on Mar. Ins., §§ 1497, 1577, 1597; 2 Pars. on Mar. Ins., 85; *Fitz* v. *The Amelie*, 2 Clif., 442, 445; *The Amelie*, 6 Wall., 26, 29; *Savage* v. *Corn Ex. Ins. Co.*, 36 N. Y., 657; *Ruckman* v. *Mer. Ins. Co.*, 5 Duer, 363; *Gordon* v. *F. and M. Ins. Co.*, 2 Pick., 261; *Reid* v. *Bontham*, 3 B. & B., 147; *Patapsco* v. *Southgate*, 5 Pet., 620; *N. E. Ins. Co.* v. *Sarah Ann*, 13 id., 400; *Post* v. *Jones*, 19 How. [U. S.], 157; *Brondrett* v. *Hentrigg*, 1 Holt., 149; *Tilton* v. *Ham. Ins. Co.*, 1 Bosw., 367; *White* v. *Repub. Ins. Co.*, 57 Me., 93; May on Ins., 491, 492; Tudor on Mer. Law [2d ed.], 158; *Allen* v. *Lagrue*, 8 B. & C., 561; *Young* v. *Pac. M. Ins. Co.*, 34 Supr. C. R., 331; *Robertson* v. *Clark*, 1 Bing., 445; *Parry* v. *Aberdeen*, 9 B. & C., 411; *Rhinelander* v. *Ins. Co. of Penn.*, 4 Cranch, 45; *Fleming* v. *Smith*, 1 H. L. Cas., 526; *Mullett* v. *Shedden*, 13 East, 304.) A sufficient notice of abandonment was given to enable plaintiffs to recover for a total loss. (2 Pars. on Mar. Ins., 296, 174; *Heebner* v. *Eagle Ins. Co.*, 10 Gray, 139; *King* v. *Walker*, 3 Exch., 213; *McIntyre* v. *Bowne*, 1 J. R., 229; Arn. on Mar. Ins., 1162; 2 Phil. on Mar. Ins., § 1682; *Cassidy* v. *La. Ins. Co.*, 9 Martin [6 N. S., 223], 421; *Maryland* v. *Phœnix Ins. Co.*, 5 G. & J., 238; *Ocean Ins. Co.* v. *Francis*, 2 Wend., 71; *McLellan* v. *Me. Ins. Co.*, 12 Mass., 252; *Houstman* v. *Thornton*, 1 Holt [N. P.], 242; *Thwing* v. *Wash. Ins. Co.*, 10 Gray, 451; *Silloway* v. *Manuf. Ins. Co.*, 12 id., 43.) In any event the verdict must be sustained as a rightful recovery for a partial loss. (2 Phil. on Mar. Ins., 1497; *Renaud* v. *Peck*, 2 Hilt., 137; *Campbell* v. *Woodworth*, 20 N. Y., 499; *Dixon* v. *Buck*, 42 Barb., 74; *Crouse* v. *Fitch*,

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6 Abb. [N. S.], 187; *Gill* v. *McNamee* 42 N. Y., 46; *Hagar* v. *N. E. Mar. Ins. Co.*, 59 Me,, 463; *Smith* v. *Manuf. Ins. Co.*, 7 Metc., 453; *Suydam* v. *Mar. Ins. Co.*, 2 J. R., 144; *Mellish* v. *Andrews*, 15 East, 15; *Graves* v. *Wash Mar. Ins. Co.*, 12 Al., 395.) Defendant is estopped by its acts and declarations when the insurance was effected from claiming that the memorandum printed on the margin of the policy formed a part of it, or that the policy never attached. (*Braisted* v. *F. L. and T. Co.*, 4 Seld., 305; *Barlow* v. *Scott*, 24 N. Y., 42; *Hoffman* v. *Ætna Ins. Co.*, 32 id., 413; *Johnson* v. *Hathorne*, 2 Keyes, 484; *Johnson* v. *Jones*, 4 Barb., 373; *May* v. *Buckeye Ins. Co.*, 25 Wis., 306; *Keith* v. *Globe Ins. Co.*, 52 Ill., 827; *Pratt* v. *Mut. Ins. Co.*, 9 Bosw., 100; *Comm. Ins. Co.* v. *Sparkraable*, 52 Ill., 517; *Eveland* v. *Wheeler*, 37 N. Y., 249; Bliss on F. Ins., §§ 29–82, 291–293; *Chester* v. *Bk. of Kingston*, 16 N. Y., 343; *Frost* v. *Sar. Mut. Ins. Co.*, 5 Den., 154; *Plumb* v. *Catt. Co. Ins. Co.*, 18 N. Y., 394; *Rowley* v. *Empire Ins. Co.*, 36 id., 550; *Hathaway* v. *Payne*, 34 id., 109; *Couch* v. *City F. Ins. Co.*, 37 Conn., 249; *Howitz* v. *Eq. Ins. Co.*, 40 Mo., 557; *Franklin* v. *At. Ins. Co.*, 42 id., 461; *Coombs* v. *Han. Ins. Co.*, 43 id., 157; *Hayward* v. *Nat. Ins. Co.*, 52 id., 188; *Ins. Co.* v. *Mahone*, 21 Wal., 155; *Woodberry* v. *C. O. Ins. Co.*, 31 Conn., 526; *Schuyler* v. *Russ*, 2 Cai. R., 202; *Bidwell* v. *N. W. Ins. Co.*, 24 N. Y., 304; *Peoria Ins. Co.* v. *Hall*, 12 Mich., 214; *Bevin* v. *Conn. Mut. Ins. Co.*, 23 Conn., 264; *Rathbone* v. *City F. Ins. Co.*, 31 id., 209; *Hutchins* v. *Smith*, 46 Barb., 240; *Block* v. *Col. Ins. Co.*, 42 N. Y., 401.)

Joseph H. Choate for the respondent. The policy was rendered void by the deviation in the voyage. (*Hearne* v. *N. E. Mut. M. Ins. Co.*, 20 Wal., 488, 494; *Lawrence* v. *Ocean Ins. Co.*, 11 J. R., 241; *Fireman's Ins. Co.* v. *Lawrence*, 14 id., 55; 3 Kent's Com., *312; Smith's Mer. Law [3d Am. ed.], 459; 1 Phil. on Ins. [5th ed.], § 983; 2 Pars. on Mar. Ins., 2; 1 Arn. on Ins, *354; *Child* v. *Sun Mut. Ins. Co.*, 3 Sandf., 26; *Stevens* v. *Comm. Ins. Co.*, 26 N. Y.,

397; *Vos* v. *Robinson*, 9 J. R., 191; *Brown* v. *Tayleur*, 4 Ad. & El., 241.) The pretended usage of navigation sought to be set up by plaintiffs was immaterial. (*Wadsworth* v. *Pac. Ins. Co.*, 4 Wend., 37; *Child* v. *Sun Mut. Ins. Co.*, 3 Sandf., 440; *Cormack* v. *Gladstone*, 11 East, 347; *De Peyster* v. *Sun Mut. Ins. Co.*, 19 N. Y., 276; Phil. on Mar. Ins., §§ 119, 133, 138; *Barnes* v. *Perrine*, 12 N. Y., 23; *Winchell* v. *Hicks*, 13 id., 563; *O'Neill* v. *Janes*, 43 id., 93; *Stone* v. *Hahn*, 47 id., 566; *Frecking* v. *Rolland*, 53 id., 424.) No total loss, actual or constructive, of the Lindo was proved by plaintiffs. (2 Pars. on Ins., 68–74, 85, note 3, 87, 152; 2 Arn. on Ins., *1001, 1082; *Roux* v. *Salvador*, 3 Bing. [N. C.], 266; *Ruckman* v. *Mer. L. Ins. Co.*, 5 Duer, 342; *Sewall* v. *U. S. Ins. Co.*, 11 Pick., 90; *Patrick* v. *Com. Ins. Co.*, 11 J. R., 9; *Peale* v. *Suf. Ins. Co.*, 7 Pick., 254; *Peale* v. *Merch. Ins. Co.*, 3 Mason, 42; *Goss* v. *Withers*, 2 Burr, 697; *Anderson* v. *Royal Ex. Ass Co.*, 7 East, 38; *Knight* v. *Faith*, 152 B., 649; *Gardner* v. *Salvador*, 1 M. & R., 117; 2 Phil. on Ins., §§ 1490, 1535, 1536; *McConochie* v. *Sun Mut. Ins. Co.*, 26 N. Y., 477; *Suydam* v. *Mar. Ins. Co.*, 1 J. R., 181; *McIntyre* v. *Bowen*, id., 229.) The warranty as to the captain who should command the vessel not having been fulfilled the policy never attached. (2 Pars. on Ins., 85, note; 1 id., 42, 337; 1 Phil. on Ins., § 10; 2 id., § 2155; *Lewis* v. *Thatcher*, 15 Mass., 431.)

Andrews, J. The policy was upon the bark Lindo, "at and from Miramichi to a port in Cape Breton, and at and from thence to New York, with privilege of carrying coal exceeding her tonnage." The insurance was effected on the 26th of November, 1864, after the vessel had sailed from the port of departure, having cleared for Big Glace bay, a port in Cape Breton Island, under a charter to load with coal at that port, which, however, contained a provision that "if, on the arrival at Big Glace bay, the captain does not consider it safe to remain and load there, he is to be at liberty to proceed elsewhere, and this charter is to be considered canceled."

Opinion of the Court, per Andrews, J.

The Lindo arrived at North Sydney on the evening of the twenty-sixth of November, where she anchored, and remained until the twelfth of December, when she sailed to Cow bay, and while loading with coal at that place on the twentieth of the same month, was driven upon the rocks, and met with the disaster which has given rise to this action.

Sydney is a port in Cape Breton Island, lying east of Big Glace bay and Cow bay, having a safe harbor, and distant twelve miles from Big Glace bay, and twenty miles from Cow bay, and is first reached on a voyage from Miramichi to either port. Big Glace bay and Cow bay are coaling ports where large quantities of coal are shipped, although, geographically considered, they are open roadsteads, exposed to the sea, affording no protection to vessels from winds and storms. Coal was not to be had at Sydney when the insurance in question was effected.

It was clearly established, on the trial, by the testimony of a large number of witnesses, competent to speak upon the subject, that it was the usual custom for vessels bound to either Big Glace bay or Cow bay, for coal, during the fall and winter months, to first stop at Sydney. The masters would then communicate overland with the agent of the mines, and ascertain when their vessels could be loaded, and when notified would proceed to the port of lading, and receive their cargo. This custom was established for the safety of vessels, and to avoid exposing them to the danger they would encounter from lying in an open roadstead on a dangerous coast, at that season of the year, while detained awaiting their time to load. The master of the Lindo, on the day after his arrival at Sydney, went to Big Glace bay, and finding that there was no wharf at that place, and that vessels could only be loaded from scows, or lighters, while lying at considerable distance from the shore, concluded that it was an unsafe place to load, and immediately went to Cow bay, where there was a substantial wharf, and much better facilities for loading, and entered into a charter with the agent of the mines, at that

place, to load with coal for New York. The vessel left Sydney for Cow bay as soon as her time to load arrived.

The first point urged by the learned counsel for the defendant in opposition to the recovery in this case is, that the vessel having stopped at Sydney, a port in Cape Breton, exhausted the privilege given in the policy, and when she went to Cow bay, another port in the same island, where she was wrecked, she was not covered by the policy. The contention is, that the words in the policy "to a port in Cape Breton" limit the vessel to the use of one port in the island, and by necessary implication prohibit the use of two ports, and it is insisted that assuming the actual voyage undertaken was from Miramichi to Cow bay, and thence to New York, the insured voyage was to one port in Cape Breton only, and that sailing to Cow bay after stopping at Sydney was a deviation which discharged the insurers. The custom to stop at Sydney on a voyage to Cow bay cannot, it is said, authorize stopping at both ports under this policy, for the reason that if permitted to operate it would contravene the express contract of the parties.

We are of opinion that this argument is based upon too narrow an interpretation of the policy. In policies of marine insurance the ultimate and intermediate *termini* of the voyage are generally stated. But this is never construed to prohibit stopping at other intermediate ports, which by the course of navigation, or the usage of trade, are usually entered, in making the insured voyage. In the absence of words excluding it, the course of navigation prescribed by usage may, and indeed must, be pursued. This is an implied condition which attaches to every contract of marine insurance, and if a port is entered belonging to the voyage according to the established usage, there is no deviation, although no mention is made of it in the policy. It is for the interest of all parties that the usages of navigation should be observed. They are founded upon experience, and the consent of navigators and others best able to judge what the interests of all parties require. Contracts of insurance are construed in the light of estab-

lished usage, which, unless excluded by express words, is deemed to be a part of the contract. (1 Arn. on Ins., 333; 2 Parsons, on Ins., 8, and cases cited; 1 Phillips, on Ins., 997.)

If the policy in this case had specified a voyage from Miramichi to Cow bay and thence to New York, it cannot be doubted upon the authorities that stopping at Sydney, would not have been a deviation. The stopping at that port was a part of the customary course of the voyage to Cow bay, and stopping there in conformity with the usage would not have vitiated the policy. The words "to a port in Cape Breton" in the policy, gave to the insured the right to select any port in the island for the purposes of the voyage, and the clause allowing the vessel to carry coal exceeding her tonnage, taken in connection with the trade carried on with the island, indicated to the underwriter, that the vessel was bound there to load with coal. The words used in describing the intermediate *terminus adquem* of the voyage were inserted for the benefit of the insured, and to enlarge and not to restrict his rights under the policy. They indicate no purpose of limiting the vessel to, or excluding her from, using any particular port. The right to select any port was the right intended to be secured to the insured by the indefinite words of the policy. The vessel was free to choose any customary loading port on the island for obtaining her cargo, and in going to the selected port, to make the voyage in the usual and customary manner. The master, therefore, if he elected under the policy to go to Cow bay for his cargo, was authorized to stop at Sydney awaiting his time to load. This was the practice of the trade and was necessary for the safety of the vessel. It was not using two ports of lading. The use of the first port was incidental to the accomplishment of the voyage to the selected port. "It is absurd" said Lord MANSFIELD, in *Pelly* v. *Royal Exchange Assurance Society* (1 Burr., 348), "to suppose that when the end is insured the usual means of attaining it are to be excluded." Insurers are presumed to be acquainted with the situation of ports and harbors, and the course of navigation, and the practice of

the trade they insure. (1 Doug., 510; 10 Jo., 120; 4 Wend., 34; 36 N. Y., 172.) The words "to a port in Cape Breton," used in the policy in question, construed in view of the object of the voyage, which it is fair to presume was known to the insurer, indicated a coaling port in that island, and the privilege of the policy was not exhausted by going into Sydney for safe anchorage, according to the usual custom. The case of *Hearne* v. *The New England Marine Insurance Company* (20 Wall., 489) is not in conflict with these views. The insurance in that case was "at and from Liverpool to a port in Cuba, and at and thence to port of anchorage in Europe." It was held, that the policy did not cover an independent voyage from the port in Cuba, where the vessel discharged her outward cargo, to another port in the same island where she went to reload, and that this deviation could not be justified by proof of usage, as it would contradict the contract.

Another point made by the counsel for the defendant is, that the Lindo cleared and sailed for Big Glace bay, under charter to load there for New York; that this was the actual voyage undertaken, and constituted the insured voyage, as soon as the policy was issued, and that the voyage to Cow bay was a deviation. But the reservation of the right to cancel the charter, if the master of the vessel, on arrival at Big Glace bay, should he deem it unsafe to remain and load there, made it uncertain what the actual voyage would be. It could only be made certain when the master should finally elect to what port of lading he would go. He made this election on his arrival at Sydney, a port of anchorage common to a voyage either to Big Glace bay or Cow bay, and while in the direct course of a voyage to either place. If he had elected in the first instance to go to Big Glace bay, or had first gone to that port, and then sailed for Cow bay, a different question would be presented. An election once made would determine the right forever (11 Jo., 241; 14 id., 55), and an entry into one coaling port, not compelled thereto by stress of weather, or other necessity, although he

did not load there, would exhaust his privilege under the policy. It is reasonable to assume that it was because the destination of the Lindo at Cape Breton was undetermined, that she was insured "to a port" in the island. Her clearing for Big Glace bay was only *prima facie* evidence of her destination. (1 Phillips on Ins., § 994.) It was her probable destination, but whether it would be her actual destination or not, depended on a contingency which was contemplated, and provided for in the charter. The insurer was not prejudiced by the election to go to Cow bay. The right of election was given by the policy; the vessel was at all times in the track of a voyage to the selected port. The election was exercised in conformity with the original charter. The condition that it should be made "on arrival at Big Glace bay," was satisfied when the master, on going there from Sydney, determined that he would not load at that port. It was not necessary that he should take the vessel there before making his election. Nor did he go to Sydney to choose a port in any general or unrestricted sense; he went there as a port of safety, on a voyage to Big Glace bay, or Cow bay, as he should then determine.

The plaintiff claimed a total loss, and the recovery was had upon that theory; and it is claimed that there could be no recovery for a total loss as there was no abandonment. No abandonment is necessary when there is an actual total loss of the insured subject. (*Roux* v. *Salvador*, 3 Bing. [N. C.], 288.) The physical destruction of the thing insured leaves nothing to abandon. But the mere fact that an insured vessel exists in specie, does not necessarily prevent the insured from claiming a total loss without abandonment.

If, after encountering a sea peril from which it sustained injury, it is for that reason justifiably sold by the master, the loss then as between the insured and insurer becomes a total one. The title is by such a sale irrevocably gone from the owner, and cannot, by abandonment, be transferred to the insurer. The insured may, under such circumstances, claim a total loss, accounting to the insurer for the proceeds of the

sale, as salvage received for his benefit. (*Idle* v. *Royal Exchange Ins. Co.*, 8 Taunt., 755; *Cambridge* v. *Atherton*, 1 R. & Mood., 60; id., 2 B. & C., 691; *Roux* v. *Salvador*, *supra*; *Dyson* v. *Rowcroft*, 3 Bos. & Pul., 474; *Gordon* v. *Mass. Fire and Marine Ins. Co.*, 2 Pick., 249; *The American Ins. Co.* v. *Center*, 4 Wend., 53; 2 Parsons' Insurance, 86; Arnould on Insurance, 850; 2 Phillips on Insurance, § 1497.)

The sale, when justifiably made, is not the cause of the loss, but the sea peril, which made the sale necessary.

The Lindo, while lying at her wharf at Cow bay, taking in her cargo, was struck by a violent gale, and torn from her fastenings and driven stern foremost upon the rocks, a quarter of a mile away, under a perpendicular cliff eighty feet high, where she was bilged and filled with water; her mainmast and fore and mizzen-topmast were carried away, and the whole ship was badly strained and logged. She lay thumping upon the rocks and could only be approached by water; her boat was gone, and the crew remained twenty-four hours upon the wreck before they could be taken off. The situation of the bark was in the highest degree perilous. There was no probability that she could be got off the rocks during the winter, and it was probable that before the spring she would go to pieces; the master had a survey of the vessel made by competent surveyors, who examined her and certified that she was a complete wreck, and advised a sale; he thereupon sold her at public auction, after due notice, in the presence of a large number of people. There is no ground to question the *bona fides* of the sale; in making it the master did what he believed to be for the interest of the owners. He did not then know that the vessel was insured. The purchasers succeeded in getting her off the next season, and they repaired her and then sold her for less than the cost of repairs. The shattered condition of the bark, away from her home port, the impossibility of getting her off the rocks during the winter, the probability of her early and entire destruction from the violence of the winds and sea, on an exposed and dangerous coast, and the fact that

the expense of repairs would exceed her value when repaired, constituted, within the cases, an urgent necessity which justified the master in making a sale, and an abandonment was, therefore, unnecessary. (*The Amelie*, 6 Wall., 30; *Butler* v. *Murray*, 30 N. Y., 88; *Robertson* v. *Clark*, 1 Bing., 445; *Robertson* v. *Carother*, 2 Stark, 57; 2 Arnould on Ins., 1091; 2 Parsons on Ins., 86.)

The warranty in the policy, that the Lindo was commanded by a captain holding a certificate from the American Shipmasters' Association, was not complied with; but the facts stated in the complaint and proved on the trial, made a case for the reformation of the contract, by striking out this warranty. The defendant's counsel, at the conclusion of the evidence, made a motion for a nonsuit, and also that the court direct a verdict for the defendant. The court was not requested to submit any question of fact to the jury; and, as the evidence would have warranted the jury in finding for the plaintiff on the whole issue, and the court was called upon by the defendant to decide the case on a question of law, the finding of the facts by the court instead of by the jury is not a ground of exception. (*Marine Bank* v. *Clements*, 31 N. Y., 43; *Mallory* v. *Tioga Co. Railroad*, 3 Keyes, 356.)

Upon the whole case we are of opinion that the judgment of the General Term should be reversed, and the judgment on the verdict affirmed, with costs.

All concur.

Judgment accordingly.

Statement of case.

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WILLIAM M. BAKER, Respondent, v. ALBERT A. DRAKE et al. Appellants.

The relation of broker and customer, under the ordinary contract for a speculative purchase of stock, is that of pledgee and pledgor. (ALLEN and RAPALLO, JJ., dissenting.)

A sale of the stock by the broker under such contract, without notice to the customer of the time and place of sale, is a conversion. (ALLEN and RAPALLO, JJ., dissenting.)

Oral proof of the usage of brokers in such cases, is not admissible to add to or make part of the contract. (ALLEN and RAPALLO, JJ., dissenting.)

The parties to the contract, however, may provide therein for any manner of disposing of the pledge to satisfy the claim upon it, which is not in contravention of a statute, against public policy, or fraudulent.

Plaintiff employed defendants to purchase stocks for him upon margin, he agreeing that all transactions in stocks should be in every way subject to the usages of defendants' office. In an action for a conversion, by an alleged sale without notice, of stocks purchased, defendants offered to prove that it was the custom of their office to sell on account of failure to furnish sufficient margin at the stock exchange without giving notice to the customer of the time and place of sale. This offer was rejected. *Held* (CHURCH, Ch. J., ANDREWS and MILLER, JJ., dissenting), error.

Upon the question of damages the court charged the jury, in substance, that if the right of action was established, plaintiff was entitled to recover what it would have cost him to replace the stocks on a day within a reasonable time after the sale, deducting the sum due to the defendants. *Held*, no error.

(Argued April 24, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought for an alleged conversion by defendant of 500 shares of the stock of the Chicago and Alton Railroad Company.

Plaintiff, through one U. F. Rogers, who acted as his agent, employed the defendants, who were doing business as stock brokers in the city of New York, under the firm name of Drake Brothers, to make speculative purchases of stocks for him, upon a margin.

Statement of case.

Rogers had been previously operating in stocks, the defendants acting as his brokers. A written agreement had been made between them. The evidence was conflicting as to whether this agreement had been abandoned, and as to whether it was extended and applied to plaintiff's transactions. Plaintiff gave to Rogers the following letter of instructions, which Rogers delivered to defendants:

"NEW YORK, *April* 16, 1868.

"MESSRS. DRAKE BROTHERS:

"GENTL'M. — You are hereby authorized to negotiate for my acct. such transactions in stocks and other securities as Mr. U. F. Rogers may think best to direct.

"All transactions under his directions be duly knowledged and confirmed, and in every way subject to the usages of your office.

"Yours truly.

"WM. M. BAKER."

Prior to this defendants had bought on plaintiff's account 500 shares of the Chicago and Alton Railroad stock. The stock having declined and plaintiff having failed to furnish additional margin, defendants sold the stock at a loss, in November, 1868, at the stock exchange, without giving plaintiff any notice of the time or place of sale.

Upon the trial of the action defendants' counsel asked one of the defendants, who was being examined as a witness, the following question: "In the year 1868, from the first of January to the first of December, had you a custom in your office in reference to the manner in which sales were made of stocks which you had purchashed for your customers when the margin was insufficient in cases of sales on account of an insufficient margin." This was objected to, and objection sustained.

Said counsel then offered to prove by the witness "that in 1868, from the first of January to the first of December, there was a custom in their mode of doing business in cases of the sales of stocks of customers purchased under circumstances similar to this stock for Mr. Baker, when a sale was made on

account of the margin being insufficient on account of a failure to furnish sufficient margin, and that by that custom the stock was sold at the stock exchange in the city of New York, and no notice was given to the customer of the time or place of the sale." This was objected to. Objection sustained, and defendants' counsel duly excepted.

The court charged the jury as follows: "If you find that the contract was as claimed by the plaintiff, and this sale was made without notice, you will assess the damages upon the following principles: The plaintiff is entitled to recover, as damages, what it would have cost to replace the stock, that is, the price of the stock, on a day within a reasonable time after the wrongful sale, to replace the stock after deducting what was due to the defendants in the dealing between the parties." To which defendants' counsel duly excepted.

James C. Carter for the appellants. The ruling of the judge excluding evidence of the general usage between brokers and their customers, was erroneous. (2 Greenl. Ev. [Redf. ed.], 224; 1 Smith's L. Cas. [6th Am. ed.], 835; *Mollett* v. *Robinson*, L. R., 5 C. P., 646; 7 id., 84; *Horton* v. *Morgan*, 19 N. Y., 170; 41 id., 244; *Allen* v. *Dykers*, 3 Hill, 597; *Sutton* v. *Latham*, 10 Ad. & El., 27; *Bayliffe* v. *Butterworth*, 1 Exch., 425; *Pollock* v. *Stables*, 12 Q. B., 765; *Grissell* v. *Bristowe*, L. R., 4 C. P., 36; *Coles* v. *Bristowe*, L. R., 4 Ch. App., 3; *Maxted* v. *Paine*, L. R., 6 Exch., 132; *Duncan* v. *Hall*, id., 255; *Fleet* v. *Murton*, L. R., 7 Q. B., 126.) Defendants were not bound to give notice of the time and place of sale. (*Marine Nat. Bk.* v. *Nat. City Bk.*, 59 N. Y., 67, 72.) Plaintiff having failed to disaffirm the sale until this action was commenced, must be deemed to have ratified it, and cannot maintain this action. (*Hanks* v. *Drake*, 49 Barb., 186; *Hope* v. *Lawrence*, 50 id., 258; *Law* v. *Cross*, 1 Black, 539; *Foster* v. *Rockwell*, 104 Mass., 172; *Coucier* v. *Ritter*, 4 Wash., 553; *Smith* v. *Cologan*, 2 T. R., 188, n.; *Towle* v. *Stevenson*, 1 J. Cas., 110; *Cairnes* v. *Bleecker*, 2 J. R., 301; *Baker* v. *Drake*, 53 N. Y., 211, 217.)

Opinion of the Court, per FOLGER, J.

James Emott and *Frederick A. Ward* for the respondent. The exception to the exclusion of evidence of usage in Wall street, or custom among brokers, was not well taken. (*Bower* v. *Newell*, 4 Seld., 190; *Dykers* v. *Allen*, 7 Hill, 497; *Merchants' Bank* v. *Woodruff*, 6 Hill, 174; *Wheeler* v. *Newbould*, 16 N. Y., 392; *Higgins* v. *Morse*, 34 id., 417; *Berrine* v. *Lord*, 1 Seld., 95; *Thompson* v. *Riggs*, 5 Wal., 663.) Plaintiff's stipulation acknowledging all transactions under Roger's directions to be subject to the usages of "defendants' office," did not apply to the unauthorized sale, and the evidence offered as to it was not admissible. (*Markham* v. *Jaudon*, 41 N. Y., 235.) The stocks purchased by defendants for plaintiff were his property. (*Andrews* v. *Clark*, 3 Bosw., 585; *Mallory* v. *Willis*, 4 N. Y., 76; *Pollen* v. *Leroy*, 30 id., 549; *Mallory* v. *Lord*, 29 Barb., 455; *Merwin* v. *Hamilton*, 2 Duer, 244.) Defendants held the stock as security for the advance made by them. (*Ashton* v. *Greene*, 3 Campb., 426; *Oakley* v. *Oakley*, 16 Q. B., 941; *Griffith* v. *Perry*, 1 E. & E., 680; Blackburn on Sales, 325; Benjamin on Sales, 594) Defendants were pledgees, and had no right to sell it. (Story on Bailments, §§ 7, 297; *Stearns* v. *Marsh*, 4 Den., 227; *Wilson* v. *Little*, 2 N. Y., 443; 16 id., 396; Story's Eq. Jur., § 1008; 2 Kent's Com., 582.) No right to sell it without notice was conferred on defendants by their agreement with plaintiff. (Russell on Factors, 212; *Marfield* v. *Goodhue*, 3 N. Y., 62; *Gihon* v. *Stanton*, 5 Seld., 476.)

FOLGER, J. This case was argued orally before six members of the court. I did not have the benefit of that argument, nor of some of the subsequent discussion of the case, among the six judges, in our consultation room. It is, however, the practice of this court, that where a judge is absent from an oral argument of a case, it is to be treated as submitted to him, without oral argument.

Upon the consultation among the six members of the court who heard the oral argument, they were equally divided in opinion — three being for an affirmance of the judgment

appealed from, and three for a reversal of it and for a new trial.

On my return to the court the case was submitted to me upon the printed appeal-book and the printed points of the parties, and I also had the benefit of the views in writing, and orally, of the judges who were for affirmance. My investigation of the case, and my reflections upon it, brought me to the conclusion that the learned judge, at the trial, fell into an error in rejecting the testimony which was offered by the defendants to show what were the usages of their office, and it has been thought best that I should draw up the views of the court upon the case, and the reasons for a reversal of the judgment, so that the parties may have some guide upon a new trial, if one is had. This I now do, as briefly as may be.

All but two (ALLEN and RAPALLO, JJ.) of the members of the court adhere to the decision in *Markham* v. *Jaudon* (41 N. Y., 235) on three points there maintained:

First. That the relation of broker and customer, under the ordinary contract for a speculative purchase of stocks, is that of pledgee and pledgor.

Second. That a sale of the stock by the broker, under such a contract, without notice to the customer of the time and place of sale, is a conversion.

Third. That oral proof of the usage of brokers in such cases is not admissible, to add to or make part of the contract.

See, also, *Stenton* v. *Jerome* (54 N. Y., 480), where *Markham* v. *Jaudon* (*supra*) is referred to with approval.

But it is further considered that the parties to such a transaction, which thus creates the relation of pledgee and pledgor, between them, may provide by contract for any manner of disposing of the pledge to satisfy the claim upon it. This is not dissented from by any judge. This restriction is affixed, however, that the manner agreed upon must not be in contravention of a statute, nor against public policy, nor fraudulent. (*Wheeler* v. *Newbould*, 16 N. Y., 392; *Milliken* v. *Dehon*, *Ex'x*, 27 id., 364; *Stenton* v. *Jerome*, *supra*.)

The points in this regard, upon which there is a difference

of opinion in this case, are, first, whether there was not uncontroverted evidence of a contract to that effect; and, second, whether the defendants offered competent proof, that the contract between them and the plaintiff did provide for a sale without notice. As to the first of these points, the case must rest upon the evidence relative to the contract of the defendants with Rogers, and to the adoption of the terms of it into the transactions of the defendant with the plaintiff. We do not think that the evidence of that adoption was uncontroverted. There was a dispute as to it. The question was left to the jury, who found against the defendants. The defendants now claim that the judge erred in submitting to the jury the question whether that contract had been abandoned at the time the dealings between these parties commenced. The decisive answer to this point is, that the submission of that question to the jury was not excepted to. The exception taken was to the submission to the jury of the question, whether the dealings were under that contract, and can only be sustained by showing that this fact was conclusively established.

As to the second of these points, the defendants offered in evidence an instrument in writing, signed by the plaintiff. It was received without objection, although not consistent with the allegations of the answer. It is in the case. By it the plaintiff agreed that all transactions in stocks, under the direction of Rogers, should be in every way subject to the usages of the defendant's office. The last clause of this instrument was not unmeaning and useless. It was of some import. It was part of the plaintiff's agreement. The word "usages" meant the habits, mode and course of dealing in the office of the defendant. If, instead of this word, those habits, modes and course of dealing had been set forth at length in the instrument, would not the transactions of the plaintiff and defendants in stocks, under the directions of Rogers, have been subject to them, subject to the rules of law? As they were not so set forth, the word "usages," alone, does not convey the full meaning of the parties to the instrument, and a court may not, from a perusal of the paper, know all that was

in their contemplation. There is need of parol proof to enable the word used by them to convey the full meaning with which they meant to charge it. And parol proof is competent therefor. If parol proof should show that it was a usage of the defendants' office, for want of margin, to sell stocks in pledge at the public board of brokers, without notice to the pledgor of time or place of sale, would it not tend to establish an agreement by the plaintiff, that the same course might be taken in his case? To so agree would not have contravened any statute, nor infringed upon public policy, and it might not have been fraudulent. We do not stop to consider the weight or effect of the testimony offered, when it shall have been received, nor how — either by counter proof or by rules of law — the plaintiff may meet and overpower it. The sole question now is: Was the proof offered by the defendants competent? We think that it was, and that it was error to reject it.

The rule of damages given to the jury was, we think, justified by the decision of this court in this case, on the first appeal. The judge charges the jury, in substance, that if the right of action was established, the plaintiff was entitled to recover, as damages, what it would have cost him to replace the stocks on a day within a reasonable time after the sale, deducting the sum due to the defendants, and the recovery was based upon the market value of the stock, on a day between the sale and the commencement of the action.

The charge was in accordance with the rule adopted by this court on the first appeal in this case. (53 N. Y.)

The judgment should be reversed and a new trial ordered for the erroneous rejection of testimony.

ALLEN, RAPALLO and EARL, JJ., concurred in the result, and also in the opinion, except as otherwise stated therein.

CHURCH, Ch. J., ANDREWS and MILLER, JJ., were for the affirmance of the judgment, but disagreed with the opinion only on the point of the rejection of the testimony of the usages of defendants' office.

Judgment affirmed.

Statement of case.

66 525
116 339
116 348
116 350
66 525
128 128
66 525
142 503

JOSEPH N. FAGNAN, Respondent, *v.* CHARLES KNOX, Appellant.

Although in an action for malicious prosecution it appears that the apparent facts were such that a discreet and prudent person might have been led to a belief that plaintiff was guilty of the crime for which he was prosecuted by defendant, yet if it appear that the latter had knowledge of facts which would explain the suspicious appearances, and exonerate plaintiff, he cannot justify the prosecution by putting forth the *prima facie* circumstances, and excluding those thus within his knowledge tending to prove innocence.

Plaintiff had been for many years confidential managing clerk for defendant, having charge of the money drawer, and control and supervision over the employes, including the cashier. Upon examining his account it appeared that some items charged to him upon a petty cash-book, kept by the cashier, had not been transferred to the cash-book kept by plaintiff, and a larger number of charges upon the latter book had not been transferred to the ledger. There was also an erasure and some false additions in favor of plaintiff. Defendant caused plaintiff's arrest for embezzlement. In an action for malicious prosecution, the evidence tended to show that plaintiff admitted the correctness of the account as made up by the examiner and settled with defendant by conveying to him certain real estate, the latter giving a general release. Plaintiff testified that he kept a private memorandum-book which explained the apparent discrepancies, in showing sums of money loaned by him from time to time to defendant, which he deducted from the sums charged to him, and carried the balance only into the ledger account; that this account for loans was adjusted once a year; that when defendant spoke to him of the discrepancies, he produced the memorandum-book, which defendant examined, and requested permission to take: this was granted, but defendant afterward refused to produce it, and denied all knowledge of it; that he settled with plaintiff through fear of prosecution, believing the latter had suppressed his only evidence. All this was contradicted by the defendant. *Held*, that upon the facts unexplained by plaintiff's testimony, there was no want of probable cause, yet his testimony, if true, tended strongly to show bad faith on the part of defendant, and justified a finding of malicious prosecution; and that the question as to its credibility was one of fact for the jury.

The court charged in substance that if defendant, prior to making complaint against plaintiff, settled for the moneys claimed to have been embezzled as for moneys had and received, this would be evidence that he did not believe plaintiff had embezzled the moneys. *Held* error; that if money was embezzled, defendant had a right to settle as for a

Statement of case.

debt upon an implied contract, and such settlement was no bar to a criminal prosecution; nor did it furnish evidence that defendant did not believe the money had been embezzled.

It was urged, in answer to the exception to the charge, that the moneys received by plaintiff were not intrusted to him as agent, but were received from the cashier. *Held*, first, that money paid by the cashier to plaintiff by his direction was the same as if taken by himself from the drawer or safe, as he had charge of all the money; second, that the charge did not embrace this point.

Fagnan v. *Knox* (8 J. & S., 41) reversed.

(Argued May 22, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 8 J. & S., 41.)

The nature of the action and the facts are sufficiently set forth in the opinion.

Edmund Randolph Robinson for the appellant. To sustain this action it was necessary for plaintiff to establish affirmatively that the prosecution was instituted both maliciously and without probable cause. (2 Greenl. on Ev. [10th ed.], 403, § 453; 1 Hil. on Torts, 416, 430; *Miller* v. *Milligan*, 48 Barb., 36; 1 Am. L. Cas. [5th ed.], 262, 263, note; *Johnstone* v. *Sutton*, 1 T. R., 510; *Baldwin* v. *Weed*, 17 Wend., 227; *Bacon* v. *Towne*, 4 Cush, 238, 239; *Scanlan* v. *Cooley*, 2 Hilt., 489; *McKown* v. *Hunter*, 30 N. Y., 625; *Carl* v. *Ayres*, 53 id., 17.) Whether the circumstances establish a want of probable cause was a question of law for this court to decide. (*Burlingame* v. *Burlingame*, 8 Cow., 141; *Murray* v. *Long*, 1 Wend., 141; *Baldwin* v. *Weed*, 17 id., 224; *Bulkely* v. *Smith*, 2 Duer, 262; *Stone* v. *Crocker*, 24 Pick., 81; 1 T. R., 545.) Defendant's belief in plaintiff's guilt was not unreasonable under the circumstances. (*Savage* v. *Brennan*, 16 Pick., 453; *McCormick* v. *Sisson*, 7 Cow., 715; 2 Greenl. on Ev., 413, 414.) The fact that plaintiff was only acquitted on the criminal charge after a full trial, and that he

was obliged to call witnesses in his defence, showed probable cause for the prosecution. (*Smith* v. *Macdonald*, 3 Esp., 7; 8 Cow., 142; *Scott* v. *Simpson*, 1 Sandf., 601; *Roberts* v. *Bayles*, id., 49; *Vanderbilt* v. *Mathis*, 5 Duer, 304–307; *Gorton* v. *De Angelis*, 6 Wend., 418; *Stone* v. *Crocker*, 24 Pick., 81–88; *Kidder* v. *Parkhurst*, 3 Al., 396.)

John D. Townsend for the respondent. The court was not justified in nonsuiting plaintiff if there was any evidence of the want of probable cause for causing his arrest and imprisonment. (*Carl* v. *Ayres*, 53 N. Y., 16; *Besson* v. *Southard*, 10 id., 240; *Bulkley* v. *Kitiltas*, 6 id., 384; *Masten* v. *Deyo*, 2 Wend., 424.) Plaintiff was entitled to indemnity for injury to his feelings, his reputation and person, and for all expense to which he had been subjected. (2 Greenl. on Ev., § 456; *Thompson* v. *Mussey*, 3 Greenl., 305; *Sheldon* v. *Carpenter*, 4 N. Y., 579; Sedg. on Dam. [6th ed.], 566.) The two deeds introduced in evidence by plaintiff were competent and material. (*Broad* v. *Ham*, 5 Bing. [N. C.], 722; *Dain* v. *Wyckoff*, 18 N. Y., 47.)

CHURCH, Ch. J. This action is for malicious prosecution of the plaintiff for embezzlement. In such an action it is incumbent on the plaintiff to prove that the prosecution was instituted without probable cause, and maliciously. The question of probable cause is a question of law and not of fact. It is sometimes said to be a mixed question of law and fact. This only means that when the facts adduced to prove a want of probable cause are controverted, or conflicting evidence is to be weighed, or the credibility of witnesses is to be passed upon, it must be submitted to the jury to find the facts under proper instructions as to the law. (10 N. Y., 240.)

It is true, as claimed by the counsel for the defendant, that if the facts which the plaintiff's evidence tends to prove, would not establish a want of probable cause, although there may be a conflict of evidence, it is the duty of the court to

withdraw the question from the jury because a finding in favor of the plaintiffs would not avail him in law upon the point. The question of what constitutes probable cause does not depend upon whether the offense has been committed in fact, nor whether the accused is guilty or innocent, but upon the prosecutor's belief, based upon reasonable grounds. (4 Cush., 288.) The prosecutor may act upon appearances, and if the apparent facts are such that a discreet and prudent person would be led to the belief that the accused had committed a crime, he will not be liable in this action, although it may turn out that the accused was innocent. (53 N. Y., 17.) If there is an honest belief of guilt, and there exist reasonable grounds for such belief, the party will be justified. But however suspicious the appearances may be from existing circumstances, if the prosecutor has knowledge of facts which will explain the suspicious appearances and exonerate the accused from a criminal charge, he cannot justify a prosecution by putting forth the *prima facie* circumstances, and excluding those within his knowledge which tend to prove innocence.

While it is important for the public security to protect persons who in good faith institute criminal prosecutions against offenders, it is equally important to protect individuals from injury by unfounded and malicious prosecutions. It is not always easy to apply these general and familiar rules to the facts of a given case. The learned counsel for the defendant insisted that the plaintiff failed to establish a want of probable cause and that the court should have granted a nonsuit. A brief reference to the principal facts proved or claimed to have been proved will be most conducive to a proper understanding of this question as presented to the court. The plaintiff had been for more than twenty years, prior to 1872, the confidential managing clerk and book-keeper for the defendant, who was engaged in the business of a hatter. In 1872 the plaintiff was sick for a few weeks, during which the defendant employed another book-keeper whom he concluded to retain permanently, and upon the return of

the plaintiff he was relieved from the duties of book-keeper and assigned to those of managing clerk in the store, and his salary was reduced. In making up his account it was discovered that some items charged to him upon a petty cash-book kept by the cashier had not been transferred to the cash-book kept by the plaintiff, and a larger number of charges upon the latter had not been posted upon the ledger. There was also one erasure at least, and some false additions in favor of the plaintiff upon the ledger, which, with the items not posted, amounted to about $2,500, all of which occurred in about three years. There was evidence tending to show that the plaintiff admitted the correctness of the account, and it appeared that after some negotiation, a settlement was had, the plaintiff and his wife conveying to the defendant real estate which the latter accepted in full satisfaction, and gave a general release. The plaintiff had access to, and charge of, the money drawer, and control and supervision over the employes, including the cashier. Upon these facts unexplained it is manifest that the defendant had ample cause for the prosecution. The plaintiff, however, claimed and testified in substance, that he kept a private memorandum-book which would explain these apparent discrepancies, and would show that he lent sums of money from time to time to the defendant, which he deducted from the sums charged to himself on the cash-books, and carried the balance only into the ledger account, and that these accounts for money lent were adjusted once a year between them; that when he was sick the defendant called upon him, and mentioned the discrepancies appearing on the book sagainst him, when he produced his memorandum-book, and told the defendant that it would satisfactorily explain the accounts. That the defendant examined the memorandum-book, and requested to take it away to which he consented, and that he had never seen it since, the defendant refusing to produce it, and denying all knowledge of it. The evidence of the plaintiff as to the defendant's taking the book was corroborated to some extent by his wife, and the plaintiff claimed in effect, that he was induced to settle with the defend-

ant through fear of a criminal prosecution, believing that the defendant had suppressed his only evidence, and had the advantage of him. This explanation was denied and controverted by the defendant and other witnesses.

The court denied the motion for a nonsuit, and charged that if the plaintiff gave to the defendant a memorandum-book containing memoranda of sums of money paid to the defendant by the plaintiff which would explain the apparent errors and discrepancies in the books of the defendant kept by the plaintiff in a way consistent with the plaintiff's innocence of the charge of embezzlement then the defendant had no probable cause for charging the plaintiff with embezzlement. To the refusal to nonsuit and to the charge, there was an exception. It is urged that the plaintiff's explanation is incredible, that it was contradicted by overwhelming evidence, that the fact of a settlement, and other circumstances were sufficient to establish a want of probable cause. The answer to these views is, that they were for the jury to decide. Conceding, as the defendant claims, that the explanation was improbable, that many circumstances tended to show it untrue, yet it cannot be affirmed that the circumstances might not have existed. The leading fact was the procurement of the memorandum-book, and its suppression. That question was fairly submitted to the jury. It would have been error for the court to have withdrawn that question from the jury. It depended mainly upon the credibility of witnesses, and was peculiarly a fit question for the jury. If true, it tended very strongly, if not conclusively, to show bad faith on the part of the defendant. If the book was of the character claimed and was suppressed, under the circumstances it is difficult to see how the defendant could relieve himself from the charge of malicious prosecution. Neither mistake nor misapprehension is alleged. The defendant denied all knowledge of the existence of the book and claimed that the story of the plaintiff in respect to it was untrue. The jury may have found that he was guilty of suppressing evidence against himself, and of falsehood as a witness in denying it. It is not our province

to review the facts. We must take them as found by the jury. There was no error in law therefore in denying the motion for a nonsuit, or in the charge above referred to.

The court upon request charged among others the following: "If you find that the defendant prior to the complaint against the plaintiff charging him with embezzlement, settled with the plaintiff for the moneys the defendant afterwards charged the plaintiff with having embezzled as and for a debt on contract expressed or implied, such fact would be evidence that the defendant did not believe the plaintiff had embezzled the said moneys," to which there was an exception. It is urged by the counsel for the plaintiff in answer to this exception, that the moneys received by the plaintiff were paid to him by the defendant's cashier, and that they were not intrusted to him as agent or clerk, and hence that a charge of embezzlement could not be made. It is undisputed that the plaintiff had the management and control of the establishment and its employes. He had unlimited access to the money drawer and the cashier acted under his direction. Money paid over by the cashier to the plaintiff and by his direction, was the same as if taken from the safe or money drawer by himself. He had charge of all the money in the establishment, both in fact and in law; and if he manipulated the books so as to conceal the real amount received, with intent to cheat his employer, it would make no difference whether the money came through the cashier's hands or was taken directly by the plaintiff. But the charge does not embrace the point of the argument. The judge did not charge, nor was he requested to charge, that the transaction would not constitute embezzlement for the reason now claimed, nor was it submitted to the jury to say whether the defendant treated the amount of the discrepany as an ordinary debt or over-draft; but the jury were instructed that if the defendant settled as and for a debt, express or implied, it was evidence of a want of probable cause. The charge was calculated to produce an erroneous impression. The effect of it was to convey the idea that the settlement and payment of the amount claimed by the defendant was

evidence that no crime had been committed, and that the defendant did not believe that there had been. The qualifying words "as and for a debt or contract, express or implied," do not relieve it. An action for money had and received will lie for money obtained by fraud or embezzlement. In all such cases the law implies a promise to pay. (15 Mass., 336; 3 J. R., 183; 1 Abb. Ct. of Appeals, 333.) The defendant had a legal right to settle with the plaintiff, and receive payment for the amount abstracted as and for a debt upon an implied contract, and such settlement was no bar to a criminal prosecution, nor did it furnish evidence that the defendant did not believe that the money had been embezzled. The mere fact of settlement had no legitimate bearing on that question, certainly not against the defendant, and was equally consistent with a belief of guilt or innocence. The evidence is undisputed that throughout the negotiations for a settlement the defendant claimed that he had been criminally defrauded by the plaintiff, and there is no foundation for an inference that he regarded the demand as an ordinary debt. The inference is much more reasonable that he intended by the settlement to compound what he claimed was a crime. However this may be, we think that the charge gave undue prominence to the settlement against the defendant upon the question of probable cause. There are numerous questions raised upon the admission of evidence, which we do not deem it necessary to consider. The points may not arise on another trial; and, as to some of them, it is difficult to determine, from the general character of the objections, the precise point which was intended to be decided.

For the error in the charge, the judgment must be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

66	533
167	112
66	533
169	1440
66	533
170	2552

JAMES S. MARSH, Respondent, *v.* JOHN A. DODGE et al., Appellants.

The complaint in this action alleged, in substance, that plaintiff, being the owner of letters patent for an improvement in harvesting machines, known as "Marsh's self-rake," entered into a written agreement with defendants by which he licensed them to make, use and vend the invention within a specified territory, they agreeing to pay a royalty of ten dollars on each one of the patented articles made and sold by them or by their authority or procurement; that defendants sold, but failed to account and pay as agreed. The answer was a general denial. Upon the trial plaintiff proved the alleged agreement. Defendants offered in evidence another instrument executed by the parties without date, but reciting the execution of the license "this day," and defendants proved that both were executed at the same time. In the second instrument plaintiff, for a valuable consideration, agreed to give a "drawback" of three dollars on each self-rake made and sold by defendants which were attached to other machines than "Marsh's self-rake harvesters." Plaintiff's counsel objected to the instrument as inadmissible under the pleadings, and it was rejected. *Held*, error; that the instruments should be read as one; and, as the complaint only set out part of the agreement, under a denial that the agreement was as set forth, defendants were entitled to put in evidence the part omitted.

Defendants were succeeded in business by a corporation, to whom they sold their entire stock, including the "self-rakes," finished, on hand and in the hands of agents, and a large number in process of manufacture; also the good will of the business. The corporation finished and sold the unfinished rakes; one of the defendants was its president and managing agent. *Held*, that defendants were chargeable with the royalty thereon, as they were made and sold by their authority and procurement.

Marsh v. *Dodge* (4 Hun, 278) reversed.

(Argued May 24, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 4 Hun, 278.)

This action was brought to recover an amount alleged to be due as royalty upon the manufacture and sale of a patented article under a license and agreement between the parties.

Statement of case

The complaint alleged, in substance, that plaintiff, on or about September 2, 1865, being the patentee and owner of a patent for an improvement in harvesting machines, known as "Marsh's self-rake," entered into a written agreement with defendants in and by which he licensed to said firm the right and privilege, within certain territories therein set forth, of making, using, and vending to others to be used, the improvements in said letters patent specified; in consideration whereof defendants agreed to pay plaintiff "a royalty or patent fee of ten dollars for each and every Marsh's self-rake that should be made and sold or disposed of by the said defendants, or by their authority or procurement, during the existence of said patents," an accounting for and payment thereof to be made on the first day of January in each and every year during said term. That defendants manufactured and sold 600 of the rakes, and refused to pay, etc. The answer was a general denial, fraud and the invalidity of the patent. Upon the trial, plaintiff produced and proved the instrument set forth in the complaint. Defendants offered in evidence another instrument executed by the parties, without date, but which they proved was executed at the same time as the license; the material part of which is as follows:

"Whereas, a license has this day been granted by James S. Marsh, of Lewisburg, Pa., to Dodge, Stevenson & Co., of Auburn, N. Y., to use his patented improvements, commonly known as Marsh's self-rake, and issued May 21, 1861, and February 10, 1863, and more fully set forth in said patents. Now, therefore, in consideration of one dollar to me in hand paid, and the performance of certain valuable work in the matter of introducing said improvements to public notice and use, I, the said James S. Marsh, do agree to give a drawback of three (3) dollars on each self-rake that may be made and sold by said Dodge, Stevenson & Co., or their assigns, under and by virtue of said license. The drawback heretofore mentioned is understood to apply only to such self-rakes as are made and attached to machines other than what is known as Marsh's self-rake harvesters."

Statement of case.

This was objected to by plaintiff's counsel, on the ground that it was inadmissible under the pleadings. Defendants' counsel stated that he offered the contract "for the purpose of reducing the price from ten to seven dollars." This was objected to, objection sustained, and said counsel duly excepted.

It appeared upon the trial that defendants ceased to manufacture rakes about March 11, 1866, they having sold and transferred to a corporation, organized for the purpose of carrying on the business, of which defendant Dodge was president and manager, the good will of their business and all their copartnership property and effects, including rakes manufactured before that time, and on hand or in the hands of agents, and a large number in process of manufacture, being in pieces not put together. Said corporation succeeded them in the business, carried it on, finished and sold the unfinished machines.

The court charged, among other things, that if the corporation sold any of the rakes made from the material transferred to them, such rakes were made and sold by the procurement of the defendants. Counsel duly excepted.

H. V. Howland for the appellants. Both of the instruments offered in evidence by the defendants were admissible and constituted parts of one contract. (2 Pars. on Con., 66, 68; *Harford* v. *Rogers*, 11 Barb., 18; *Man* v. *Whitbeck*, 17 id., 388; *Watson* v. *McKinney*, 3 Wend., 233; *Hall* v. *Adams*, 1 Hill, 603; *Stow* v. *Tifft*, 15 J. R., 463; *Holbrook* v. *Finney*, 4 Mass., 561; *Cornell* v. *Todd*, 2 Den., 113.) The General Term erred in holding that defendants were estopped from denying plaintiff's patent. (*Saxton* v. *Dodge*, 57 Barb., 84; *Borst* v. *Corey*, 16 id., 136; *Brooks* v. *Stolley*, 3 McL., 526; *Mitchell* v. *Barclay*, U. S. Laws [Am. Dig.], 281; *Head* v. *Stevens*, 11 Wend., 411; *Hayne* v. *Maltby*, 3 D. & E., 438; *Bliss* v. *Myers*, 8 Mass., 46; *Dickinson* v. *Hall*, 14 Pick., 267.) The court had a right to try the question whether the machines were manufactured under the Dodge or Marsh

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patent. (*Dudley* v. *Mayhew*, 3 N. Y., 9; *Cross* v. *Huntley*, 13 Wend., 385; *Head* v. *Stevens*, 19 id., 411; *Snow* v. *Judson*, 38 Barb., 211.) The court erred in holding that defendants were liable for license fees on rakes made by the Dodge & Stevenson Manufacturing Company out of materials sold it by defendants. (*Pitts* v. *Jameson*, 15 Barb., 311.)

Rollin Tracy for the respondent. The second contract offered in evidence by defendants was properly excluded. (*Conklin* v. *Gandall*, 1 Keyes, 231; *Fairbanks* v. *Bloomfield*, 4 Duer, 353; *Cornell* v. *Todd*, 2 Den., 130; 2 Kent's Com. [11th ed.], 581; *Ballard* v. *Walker*, 3 J. Cas., 60; *McCurtie* v. *Stevens*, 13 Wend., 527; *Thomson* v. *B., E. S. and S. of N. Y.*, 10 Barb., 308; *Mann* v. *Witbeck*, 17 id., 388; *Bush* v. *Tilley*, 49 id., 599; *Wemple* v. *Gardiner*, 22 id., 154; *Crain* v. *Van Horn*, 1 Paige, 455; *Hills* v. *Miller*, 3 id., 255; *McKyring* v. *Ball*, 16 N. Y., 297; *Laraway* v. *Perkins*, 10 id., 371; *Field* v. *Mayor, etc.*, 2 Seld., 179; *N. Y. C. Ins. Co.* v. *Nat. Ins. Co.*, 22 Barb., 468; *Button* v. *McCauley*, 38 id., 413; *Marsh* v. *Dodge*, 5 Lans., 541.) All the evidence showing a sale and transfer of rakes to any one was proper. (*Marsh* v. *Dodge*, 5 Lans., 541.) Parol evidence was not admissible to vary or control or nullify the record. (*Potter* v. *Howland*, 4 Blatch., 242.) The exclusion of the Dodge patent offered in evidence by defendant was correct. (*The Am. S. Co.* v. *Hogg*, 5 Fisher's Patent Cas., 353; Code, § 149; 52 N. Y., 471, 476.) The charge that the variation in the machine Dodge constructed was not an improvement was not error. (*Dixon* v. *Mayer*, 4 Wash., 71; *Hall* v. *Wiles*, 2 Blatch., 200; *Tracy* v. *Torrey*, id., 278; *Buck* v. *Hermance*, 1 id., 406; *Foote* v. *Silsby*, id., 459; *Tatham* v. *LeRoy*, 2 id., 485, 486; *Sickles* v. *Borden*, 3 id., 541; *Wyeth* v. *Stone*, 1 Story, 280; *Gorham* v. *Mixter*, 1 Am. Law J. [U. S.], 543; *O'Reilly* v. *Morse*, 15 How. [U. S.], 123; *Calhoun* v. *Ring*, 1 Fisher's Patent Cas., 411.) The exception to the charge that Dodge was obliged to rescind the contract as soon as he discovered the fraud was not well taken. (*Voorhees* v. *Earl*,

2 Hill, 288; *Cobb* v. *Hatfield*, 46 N. Y., 533.) The verdict and judgment should stand. (*Marsh* v. *Dodge*, 5 Lans., 541; *Wallace* v. *Holmes*, 9 Blatch, 65, 71.)

RAPALLO, J. We think that the exclusion of the instrument providing for a drawback was error, for which a new trial must be granted, without regard to the other questions in the case. The plaintiff set up in his complaint a written license and agreement between him and the defendants, whereby they agreed to pay him a license fee of ten dollars upon each of the Marsh's self-rakes which should be made and sold or disposed of by the defendants, or by their authority or procurement during the term of the license. The answer contained a general denial of the agreement alleged. On the trial the plaintiff proved the instrument set forth in the complaint and the defendants proved that another instrument was executed at the same time, and between the same parties, which recited the license and agreement set forth in the complaint, and provided, among other things, that the defendants should be allowed a drawback of three dollars on each self-rake made and sold by them and attached to machines, other than Marsh's self-rake harvesters. This instrument, although not dated, stated upon its face that it was made on the same day with the license, and it was proved that all the papers were executed at the same time. When offered in evidence by the defendants it was objected to on the ground that it was inadmissible under the pleadings. The defendants' counsel expressly stated that he offered it for the purpose of reducing the price from ten to seven dollars. This was, in substance, an offer to show that the machines sued for, or some of them, came within the terms of the instrument offered in evidence. No objection was taken to the form or sufficiency of the offer, but the only objection was that the instrument was inadmissible under the pleadings. The court sustained the objection and exception was taken.

It is a familiar rule that several instruments made between the same parties at the same time and relating to the same

Opinion of the Court, per Rapallo, J.

Appeal from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of plaintiffs, entered upon a verdict.

This action was brought to recover the sum of $400, gold, alleged to have been had and received by defendant, belonging to plaintiffs.

The facts appear sufficiently in the opinion.

Geo. A. Black for the appellant. To justify a recovery against the captain, plaintiffs would have had to prove that he was their agent, and received the $400 for them. (*Stevens* v. *Com. Mut. Ins. Co.*, 26 N. Y., 397; *Fernandez* v. *Gt. W. Ins. Co.*, 48 id., 581; *Kittell* v. *Wiggins*, 13 Mass., 68.) The master had a right to deem the charter broken when the cargo was refused, and to have sought other employment elsewhere. (*Hecksher* v. *McRea*, 24 Wend., 304; *Haden* v. *Demets*, 53 N. Y., 426.)

Wm. W. Niles for the respondents. The right to demand cargo from the guano company belonged only to plaintiffs, and the duty to furnish that was only due from them to plaintiffs, and a verdict was properly ordered for them. (*Butler* v. *Murray*, 30 N. Y., 88; *Hecksher* v. *McCrea*, 24 Wend., 303; *Crabtree* v. *Clark*, Sprague's Dec., 217; *Matthews* v. *Gibbs*, 3 El. & E., 285; *Bunson* v. *Atwood*, 13 Md., 20; *Reynolds* v. *Tappan*, 15 Mass., 370; *Wait* v. *Gibbs*, 4 Pick., 298.)

Rapallo, J. On the 4th of June, 1869, F. W. Mahoney, master and agent of the brig San Juan, chartered her to Moss & Ward, the plaintiffs, for a voyage from New York to Nassau, thence to Great Isaacs and back to Hampton Roads, for orders to discharge at either Baltimore, Philadelphia or New York; all the carrying capacity of the vessel was to be at the disposal of the charterers, who agreed to furnish a full cargo, or sufficient for ballast, or ballast during the voyage, and to pay for the charter $2,200.

On the same day the plaintiffs made a subcharter of the brig to James T. Sanford (who represented the Bahama Guano Company), for a voyage from Great Isaacs to Hampton Roads, for orders to discharge at either Baltimore, Philadelphia or New York; Sandford agreeing to furnish her a full cargo of guano, at Great Isaacs, and to pay freight of five dollars and twenty-five cents per ton.

The plaintiffs furnished outward freight to Nassau and gave the captain written instructions as soon as discharged at Nassau to report to Mr. Farrington (the agent of the subcharterer), who would give him what instructions he might need to proceed to Great Isaacs.

The vessel arrived at Nassau, and after discharging there, was turned over to Mr. Farrington for the purpose of being loaded with guano from the Great Isaacs. But there not being a cargo for her there, Farrington advertised her for freight at Nassau and offered to Captain Mahoney to furnish a cargo for her there direct for New York. The captain refused, saying that he was chartered to take a cargo of guano from the Great Isaacs, and that unless Farrington paid him $400 in gold he would go to the Great Isaacs, lie his lay days and go home in ballast. Farrington represented the subcharterer and had no connection with the plaintiffs. In order to prevent the captain from carrying out his threat and to secure some freight at Nassau, rather than that the vessel should go home in ballast from Great Isaacs, Farrington consented to pay the $400, and entered into an agreement with Captain Mahoney, as follows:

"In consideration of the brig San Juan not being able to get a cargo of guano at Great Isaacs, it is agreed between R. W. Farrington, agent for the Bahama Guano Company, and F. W. Mahoney, master of said brig, that the sum of $400 gold be paid by the said R. W. Farrington, as agent for the Bahama Guano Company, to the said F. W. Mahoney, master of the brig San Juan, in addition to the original charter, as compensation for non-fulfillment of charter party; and it is further

agreed, that the said R. W. Farrington have the use of the vessel to load with a full cargo, at this port, for New York.

"NASSAU, N. P., *July*, 1869.

"R. W. FARRINGTON,
Agent Bahama Guano Co.

"F. MAHONEY,
Master of San Juan."

This agreement was indorsed on a certified copy of the original charter-party from Captain Mahoney to the plaintiffs. Captain Mahoney paid over the $400 to the defendant, the owner of the brig.

The brig returned to New York, with a cargo, direct from Nassau. The plaintiffs paid the defendant the whole charter-money stipulated for in the original charter, and received from the subcharterer the whole charter-money stipulated to be paid by the subcharter, with the exception of less than fifty dollars. The reason for this deduction was offered to be shown by the defendant, but was excluded.

The plaintiffs now claim to recover the $400, paid by Farrington to Captain Mahoney. This sum, it appears, was an extra payment, beyond the amount to which the plaintiffs were entitled by their subcharter, or the defendant by the original charter. Whoever obtains it makes a profit to that extent, and the question is, to whom does it belong?

If Captain Mahoney had received it as a compromise for damages to the plaintiffs for the breach of the subcharter, or in consideration of a waiver of any of their rights, of course they would be entitled to it. But that does not appear to have been the consideration for the payment; no such damages were sustained, for the subcharterers appear to have paid what they agreed to, within a trifling amount, and Captain Mahoney does not appear to have undertaken to waive any of their rights. The real consideration of the payment appears to have been his consenting to a deviation from the voyage stipulated by the original charter. This consent he could not have given as agent for the plaintiffs, for they had

no authority to consent to or authorize such a deviation; no one but the owner, or the master acting for him, could give the consent; and consequently, whatever was exacted for that consent belongs to the owner. It related to the management of the vessel, in respect to which the master was agent for the owner. He was bound to represent the interest of the charterers only in respect to the receipt of cargo, etc., within the terms of the original charter, and so to act as to enable them to earn the subcharter money; this he did by tendering the vessel to Farrington and offering to perform the stipulated voyage. When Farrington refused that, the claim of the plaintiffs against the subcharterer was established, and the subcharterer does not appear to have disputed it. But the master was not bound to perform a different voyage for the benefit of the plaintiffs. This was done at the risk and for the benefit of the owner. All that the master was bound to the plaintiffs to do, was to perform the voyage stipulated by the original charter. Any earnings accruing from that voyage he was bound to account for to the plaintiffs. By the subcharter and instructions the vessel, after discharging at Nassau, was subject to the orders of the subcharterer. It is not pretended that any freight was to be taken from Nassau to Great Isaacs. The plaintiffs had no further interest in her except that the master should so manage as to entitle them to the freight-money stipulated by the subcharter. If he did that he performed his whole duty to the plaintiffs. If, in addition, he, at the request of the subcharterer, deviated from the stipulated voyage, and received additional compensation for so doing, such additional compensation was in no manner earned by the plaintiffs, nor under their charter. It cannot make any difference in principle whether the effect of the diversion was to shorten or lengthen the voyage; it was an act which the plaintiffs had no power to authorize, and the master in assenting to it cannot be deemed to have done so as their agent. Nor, does he appear to have done it in their behalf. It was declared in the contract that this sum was to be in addition to the original charter. This could not mean that it was received

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under the subcharter, but, clearly, that the owners were to receive it in addition to the amount which the plaintiffs had agreed to pay by the original charter, and the master acted in accordance with this construction by paying the money over to the owner. The sub-charterer also acted on the same theory by paying to the plaintiffs the whole amount of the freights for which they were liable under the subcharter, without claiming any credit for the $400 paid the master. I think it quite plain that this money was not received by the master as agent of the plaintiffs, but as agent for the owners, as a bonus, for consenting in their behalf to a deviation which the plaintiffs were incapable of authorizing, and which in no manner impaired their claim against the subcharterer.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

THE GUARDIAN MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant, *v.* ELENOR KASHAW et al., Respondents.

B. & C. were agents for the M. P. Life Ins. Co., for soliciting insurance, and had a desk in its office. Defendant K. agreed to give B. & C. a bonus or commission of $3,000, to be paid by assigning certain small mortgages, for procuring a loan from said company of $7,000. The loan was obtained upon bond and mortgage, K. receiving from the company the full amount of the loan. The small mortgages were assigned to the father of B., who was second vice-president of the company. The papers were drawn by its attorney, executed in its office, and put into its safe, and subsequently were assigned to it. B.'s father, however, testified that he had no interest in the mortgages, but took the assignments in his own name at the request of his son, who was at the time of their execution absent, and that he was to pay to B. the proceeds; that upon the assignment to plaintiff he received credit for the full amount of the mortgages, and that prior thereto plaintiff had no interest in them. In an action to foreclose the mortgage given to secure the loan, *held* (CHURCH, Ch. J., dissenting), that the evidence failed to show that plaintiff was a party to the agreement for the bonus or received any benefit therefrom, and so did not sustain the defence of usury.

(Argued May 31, 1876; decided September 19, 1876.)

Opinion of the Court, per RAPALLO, J.

APPEAL from order of the General Term of the Supreme Court in the second judicial department reversing a judgment in favor of plaintiff entered upon the report of a referee, and granting a new trial.

This action was brought to foreclose a mortgage executed by defendants, Elenor Kashaw and her husband, to the Mutual Protection Life Insurance Company, plaintiff's assignor, to secure a bond given for a loan of $7,000. The facts appear in the opinion.

Samuel Hand for the appellant. To constitute usury there must be a corrupt intent, and a receiving of more than legal interest by the lender. (*Condit* v. *Baldwin*, 21 N. Y., 219; *Mourse* v. *Prime*, 7 J. Ch., 77; *Middleton* v. *Fowler*, 1 Lock., 282; *Wilson* v. *Tamman*, 6 M. & G., 238; *Bell* v. *Day*, 32 N. Y., 165; *Fellows* v. *Comrs., etc.*, 36 Barb., 655; *Elmer* v. *Oakley*, 3 Lans., 34.) There is no different law on this subject applicable to the agent of a corporation from that applicable to the agent of a person. (A. & A. on Corps., § 29.)

J. Lawrence Smith for the respondents. The action of plaintiff's vice-president in relation to the bonus was binding upon the company, and the defence of usury was good. (*E. R. Bk.* v. *Gove*, 57 N. Y., 597.)

RAPALLO, J. The referee found, as matter of fact, that the mortgagor agreed to give for the loan a bonus of $3,000 by the assignment of eight small mortgages, but that such bonus was agreed to be given to Newel W. Bloss and Frederick W. Caruthers; that the small mortgages were assigned to B. G. Bloss, who was second vice-president of the mortgagee, and father of Newel W. Bloss. But the referee refused to find that B. G. Bloss acted in relation to these small mortgages as and for the mortgagee, and he also refused to find that the assignment of the small mortgages was for the benefit of the mortgagee.

Upon these findings the defendant failed to make out the

allegation of usury. (*Condit* v. *Baldwin*, 21 N. Y., 219; *Bell* v. *Day*, 32 id., 165; *Lee* v. *Chadsey*, 2 Keyes, 543; *Estevez* v. *Purdy*, Ct. of Appeals, June, 1876; *ante*, 446.)

But the General Term reversed the decision of the referee, upon the facts as well as the law, and it is, therefore, necessary to refer to the evidence to ascertain whether it establishes that the assignment of the small mortgages was for the benefit of the mortgagee, or that the mortgagee was a party to the arrangement under which they were transferred.

The defense set up in the answer was that the mortgagee (The Mutual Protection Society) agreed to make the loan of $7,000 to Mrs. Kashaw, the mortgagor, provided she would pay the bonus of $3,000 by the assignment of the small mortgages. It was incumbent upon the defendant to prove that the mortgagee was a party to this agreement. If the bonus was contracted for and received by Caruthers and N. W. Bloss for their own benefit, the mortgagee receiving only lawful interest for the money advanced by it, the defence of usury must, under the authorities before cited, fail. The exorbitant amount of the bonus cannot affect the legal question.

The evidence showed that Caruthers and N. W. Bloss were solicitors for life insurance for the mortgagee, and had desks in its office. It does not appear that they, or B. G. Bloss, had authority to contract in behalf of the mortgagee to make loans. The son of Mrs. Kashaw applied, on her behalf, to Caruthers to negotiate the loan, and he applied to N. W. Bloss. Kashaw had personal interviews on the subject with Caruthers and N. W. Bloss, and at one of these offered to pay the $3,000 in small mortgages if they would get the loan through. The arrangement made with Kashaw, as testified to by Caruthers without contradiction, was that Mrs. Kashaw was to give a commission to N. W. Bloss, and that he was to share it with Caruthers, and that the transfer of the small mortgages was that commission.

Thus far there is nothing to connect the mortgagee with this commission, but the circumstances relied upon for that purpose are, in the first place, that when the transaction came

to be closed, the papers were all drawn by the counsel of the company, and the assignments of the small mortgages were made to B. G. Bloss, and executed in the office of the company. B. G. Bloss explains this circumstance by testifying that he took these assignments in his own name at the request of his son, who was at the time of their execution absent in Georgia; that he had no interest in them and was to give the whole proceeds of them to his son; that they all belonged to him, except the part to which Caruthers was entitled.

It is also claimed, that the president of the company mortgagee was cognizant of and sanctioned the transaction, but this fact is not established. At the time of the execution of the assignments, the president was absent and said to be sick. The next day Mrs. Kashaw's attorney went to the office of the mortgagee, and went into the president's room and received from him a check for the full amount of the loan. He (the attorney) testifies that the small mortgages were taken by Mr. Bloss and put in the safe, but he does not say that this was done in the president's room or in his presence, and there is no evidence in the case that the president had any knowledge of the transaction. It is unnecessary, therefore, to consider what effect such knowledge would have had, if it had been shown.

The next fact relied upon is, that some of the small mortgages were subsequently assigned by B. G. Bloss to the company mortgagee, but he testifies that he received credit from the company for the full amount of the principal and interest of the mortgages so transferred. That the company had no interest in them, but they belonged to his son and Caruthers. This is all the evidence tending to connect the mortgagee with the exaction of the bonus.

There is no conflict in the testimony of the witnesses, and bearing in mind that the burden was upon the defence to establish that the company was a party to the agreement for the bonus or accepted the benefit of it, we think the evidence fails to establish that fact, and that the court at General Term was not justified in reversing the judgment entered upon the

report of the referee. Usury, like every other defence, must be established by proof, and cannot be sustained on mere surmise and conjecture, especially when the direct evidence, so far as it goes, tends to refute it.

The order of the General Term should be reversed and the judgment entered upon the report of the referee affirmed, with costs.

All concur, except CHURCH, Ch. J., dissenting.

Order reversed and judgment accordingly.

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CELINDA A. FULTON, Respondent, *v.* SOLON M. N. WHITNEY et al., Appellants.

A trustee cannot purchase for his own benefit property which, although not the subject of the trust, is connected with it in this, that a sale of the property for less than its value will diminish the trust fund; and a purchase by him for less than the value of the property inures to the benefit of the *cestui que trust*.

No actual fraud on the part of a trustee so purchasing need be shown to give to the *cestui que trust* the benefit of the purchase.

The will of P. W. bequeathed to his executors W. and T. a fund in trust First. To pay debts not otherwise provided for. Second. To pay certain legacies. He left certain real estate incumbered by a mortgage given to secure his bond. The mortgage was foreclosed and the premises bid off by W., T. and their partner J., who was cognizant of all the facts, for $5,000. The premises were worth $10,000. The sale left a deficiency of $6,577.48, which, as a debt unprovided for, was paid by the executors out of the trust fund, thereby rendering it insufficient to pay said legacies. Plaintiff, one of the legatees, and by the death of the other legatees entitled to all of said legacies, was an infant, W. being her general guardian. In an action to have a trust declared in plaintiff's favor in the property purchased, *held*, that W. and T. could not become purchasers for their own benefit; that, while they were not bound to buy in the property for the benefit of the trust estate, having no trust funds applicable to that purpose, they had no right, by undertaking to purchase for their own benefit, to create an interest in themselves hostile to their duty as trustees; that J. stood in no better position than his associates in the purchase, but was affected by the same legal disabilities.

Also, *held*, that a provision in the decree of foreclosure authorizing any of the parties to become purchasers was no protection to the purchasers

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here, nor did the confirmation of the sale have such effect, as the rights and equities of plaintiff were not before the court or involved in the foreclosure suit.

Also, *held*, that a decree of the surrogate settling the accounts of W. and T. was no bar to the action.

The judgment of the court below allowed to plaintiff the value of the real estate at the time of the purchase, less the amount paid. *Held*, no error; that the judgment was as favorable to defendants as the circumstances of the case would admit.

(Argued June 2, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon a decision of the court at Special Term. (Reported below, 5 Hun, 16.)

This action was brought to have a trust declared in plaintiff's favor in certain premises purchased by defendants.

In 1862, Parkhurst Whitney, of Niagara, Niagara county, died, leaving a will, by the thirteenth clause of which he bequeathed to his grandchildren, Olympia, Helen and the plaintiff, $4,000 each, to be paid in the manner and from the fund thereinafter provided. By the fourteenth clause he bequeathed to the defendants Whitney and Trott, who were appointed executors of the will, a mortgage made by them and the defendant Jerauld, to the testator, known as the Whitney mortgage, in trust: First, to pay the testator's debts, not otherwise provided for; second to pay out of its proceeds said $4,000 to each of said grandchildren, the interest on said sum to be paid to them, and the principal to be invested and paid in the manner particularly specified in said clause; the remainder of said proceeds were also disposed of by said clause, it finally providing that the legacies bequeathed to said grandchildren should be paid from no other part of the testator's estate than the said mortgage. By the fifteenth clause of the will the residuary estate was given to his grandchildren living at the time of his death. The will was admitted to probate, and the defendants Whitney and Trott entered upon the discharge of their duties as executors and trustees under said

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will. The plaintiff's parents died prior to the testator's death, and the defendant Whitney was appointed her guardian. She became of age March 27, 1868. In April, 1852, the testator purchased of one Woodruff certain premises, giving his bond and mortgage for the entire purchase-money, $10,000. These premises formed part of the residuary estate. This mortgage was foreclosed after the testator's death; the plaintiff and the defendants Trott and Whitney, as executors and as individuals, being parties defendant. Judgment was perfected November 14, 1866. By the terms of the judgment, either of the defendants was authorized to purchase the mortgaged premises at the sale thereof under the judgment, and Whitney and Trott, as executors, were ordered to pay any deficiency out of any moneys in their hands applicable to the payment of the debts of the said testator. The premises were sold at public sale, under the judgment, to the defendants, Whitney, Trott and Jerauld, for $5,000, they being the highest bidders, and a conveyance of the same was made to them by the sheriff. The sheriff reported a deficiency of $6,577.48, which was paid by the executors January 9, 1867, out of the proceeds of the Whitney mortgage, they having no other funds to pay the same. This sale was confirmed by the Special Term, the plaintiff in this suit, and the other infant defendants in said foreclosure suit, appearing and being heard by their guardian *ad litem*. The evidence showed that said premises were worth at the time of the sale, $10,000. Helen died in 1863, and Olympia in 1865, leaving the plaintiff their next of kin, and the only person entitled to the legacies. The defendant Jerauld, since 1864, has been a partner in business with Whitney, and Trott was cognizant of the terms of the will and of all the circumstances, and after the purchase on said foreclosure the firm removed the buildings from the mortgaged premises, and at large expense erected a stone building, covering the whole front, four or five stories high.

On the 19th day of April, 1872, Trott and Whitney, as executors and trustees, applied for a final settlement of their

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accounts to the surrogate of Niagara county. Citations were served on all parties interested, excepting the wife of the defendant Trott. The plaintiff appeared by her proctor. The defendants Trott and Whitney charged in their accounts $6,577.48, the deficiency paid on the Woodruff bond and mortgage. This was objected to by the plaintiff. The surrogate made his final decree, by which said accounts were finally settled and allowed, including the sum upon said deficiency, and it was ordered that the balance remaining in the hands of said executors and trustees was $1,673.15, which was ordered to be paid to the plaintiff, and was so paid.

It was proved by the record of a judgment of the Supreme Court in an action brought by said executors, and by Whitney, as administrator of the estates of Olympia and Helen, against the plaintiff and the other parties in interest, that the court in said action adjudged it to be the true construction of said will, that the Woodruff mortgage should not be paid by the executors, unless in case of foreclosure the premises should fail to pay the amount of the bond accompanying the same, in which case the executors were required to pay the deficiency.

The court found as conclusions of law, in substance, that defendants by so purchasing became chargeable in equity for the difference between what they paid on the purchase and the actual value of the premises, amounting, with interest, to $7,343.92, and that plaintiff had a lien on the premises for that sum, and judgment was directed directing a sale of the premises in case of non-payment, and judgment was entered accordingly.

By stipulation between the parties this sum was reduced to $6,010.19.

Samuel Hand and *E. C. Sprague* for the appellants. The *cestuis que trust* had no title, legal or equitable, to the property, and the trustees owed them no duty as to it. (*Sheldon* v. *Sheldon*, 13 J. R., 220; *Elliott* v. *Wood*, 45 N. Y., 71; *Van Epps* v. *Van Epps*, 9 Paige, 241; *Colborn* v. *Morton*, 3 Keyes,

305; *Rogers* v. *Patterson*, 4 Paige, 409; *King* v. *Talbot*, 40 N. Y., 76; *Ackerman* v. *Emott*, 4 Barb., 626; 2 Kent, 416; *Hawley* v. *Cramer*, 4 Cow., 738; *Beardsley* v. *Rott*, 11 J. R., 465; *Hollingsworth* v. *Spaulding*, 54 N. Y., 636.) This action could only be sustained by proof of actual fraud. (1 Perry on Trusts, etc., §§ 427, 429.) There was no resulting trust arising to plaintiff in the lands in question. (*S. Bap. Soc.* v. *Clapp*, 18 Barb., 35; *Van Epps* v. *Van Epps*, 9 Paige, 241; *Tony* v. *Bk. of Orleans*, id., 663; *Jackson* v. *Wooley*, 11 J. R., 446; *Sheldon* v. *Sheldon*, 13 id., 220.)

A. K. Potter for the respondent. The law does not allow persons standing in relations of trust and confidence to another to speculate, or in any way make profit to themselves, at the expense of the person whose rights are thus confided to them. (*Colburn* v. *Morton*, 3 Keyes, 296; *Gardner* v. *Ogden*, 22 N. Y., 327, 343; *Van Epps* v. *Van Epps*, 9 Paige, 237.) If defendants were not technically trustees, they were not exonerated by that fact, in respect to the property in question, if they owed plaintiff any duty inconsistent with a purchase of it at a sacrifice to her. (22 N. Y., 343; *Dobson* v. *Racey*, 3 Sandf. Ch., 60; *Gallatin* v. *Cunningham*, 8 Cow., 361; *Torrey* v. *Bk. of Orleans*, 9 Paige, 649.) They owed plaintiff a duty in respect to this property. (*Campbell* v. *Jonston*, 1 Sandf. Ch., 148; *Case* v. *Carroll*, 35 N. Y., 385.) It is no defence that it was a judicial sale, or that no greater price could have been obtained from others. (*Jewett* v. *Miller*, 10 N. Y., 405; *Davoe* v. *Fanning*, 2 J. Ch., 265.) Defendants are not protected by the order confirming the sale, or the provision in the judgment allowing the parties to purchase at the sale. (*Conger* v. *Ring*, 11 Barb., 356, 360; *Y. B. Assn.* v. *Makenzie*, 22 N. Y., 343, 8 Cow., 372, 377, 380.)

RAPALLO, J. The main question in this case is, whether the defendants Whitney and Trott were, by reason of their position as executors and trustees under the will of Parkhurst Whitney, deceased, precluded from becoming purchasers for

their own benefit, at the foreclosure sale, of the real estate covered by the Woodruff mortgage.

This real estate was not part of the property held by them in trust for the plaintiff. The trust fund consisted of the proceeds of what is called in the case, the "Whitney mortgage." That mortgage was, by the will of Parkhurst Whitney, bequeathed to the defendants Whitney and Trott, in trust: First, to pay out of the proceeds the debts of the testator not otherwise provided for by his will; secondly, to pay to the plaintiff and her two sisters a legacy of $4,000 to each; thirdly, to pay certain other legacies, and lastly, if there should remain any surplus, after making these payments, such surplus was to be divided among all the grandchildren of the testator.

Before the sale under the Woodruff mortgage, the two sisters of the plaintiff had died, and she, as their only next of kin, had become entitled to the sums bequeathed to them. She was consequently entitled out of the proceeds of the Whitney mortgage to receive $12,000, provided that amount should remain after the payment of the debts of the testator not specially provided for by his will. It appears from the findings and evidence that the proceeds of the Whitney mortgage so held in trust for the plaintiff were sufficient, after paying such debts, to have paid to her in full, or nearly so, the amount to which she was thus entitled, provided no deficiency should arise on the sale under the foreclosure of the Woodruff mortgage. The debt secured by that mortgage was one of the debts of the testator not specially provided for by his will, and was, consequently, under the provisions of the will, chargeable upon the proceeds of the Whitney mortgage in preference to the plaintiff's legacy; and in an action to which all the persons interested were parties, it had been adjudged that the premises covered by the Woodruff mortgage must primarily be charged with the payment thereof, and that the executors could not resort to other funds in their hands until the mortgaged premises had been sold and the value thereof applied upon the mortgage debt.

The result of all this was that the proceeds of the Whitney mortgage, which were held by the defendants Whitney and Trott, in trust for the plaintiff, stood bound, as surety for the payment of any deficiency which might arise on a foreclosure of the Woodruff mortgage — the mortgaged premises being the primary fund.

In this position of affairs an action was commenced for the foreclosure of the Woodruff mortgage. Judgment of foreclosure and sale was entered therein, by which it appears that the amount due for principal, interest and costs, was $11,577.48. The value of the mortgaged premises, at the time of the sale, is found in this action to have been $10,000. The defendants Whitney and Trott, together with the defendant Jerauld, who was their partner, and cognizant of all the facts of the case, became purchasers at the sale for $5,000, leaving a deficiency of $6,577.48, which was paid by the defendants Whitney and Trott out of the proceeds of the Whitney mortgage held in trust for the payment of the legacy due the plaintiff, thus rendering the trust fund insufficient to pay the legacy.

The first question now presented is, whether the defendants Whitney and Trott were, under the circumstances, competent to become purchasers for their own benefit at the sale under the Woodruff mortgage.

The case is somewhat novel, but a consideration of the principles upon which persons acting as trustees are held by courts of equity to be incapable of obtaining any benefit to themselves by dealing with the trust property, leads us to the conclusion that a dealing like the present, with other property upon which the very existence of the trust fund depends, is equally objectionable.

It was clearly necessary to the preservation of the trust fund that the premises sold under the Woodruff mortgage should bring their full value, or as nearly so as could be obtained, they being the primary fund for the payment of the mortgage, and the trust fund being liable for any deficiency. It was consequently the duty of the trustees that whatever action they might take in the matter, should be in the direc-

tion of enhancing the price which the mortgaged premises should bring at the foreclosure sale. They did not, it is true, have the direction of the sale, yet it was their duty, so far as lay in their power, to see that proper measures were taken to give publicity to it, and bring it to the attention of persons likely to become purchasers. They were not bound to buy in the property for the benefit of the trust estate, having no trust funds applicable to that purpose; but they had no right, by undertaking to purchase for their own benefit, to create an interest in themselves, hostile to their duty as trustees. As purchasers for their own benefit, it was to their interest to prevent competition at the sale, and to so manage that they could bid in the property at the lowest price, and this was directly in conflict with their duty as trustees. It is found, as matter of fact, that, at the time of the sale, the premises were worth $10,000, and their value was well known to the defendants. The plaintiff was an infant; the defendant Whitney was her general guardian, and the defendant Trott co-trustee of the trust fund. Upon them the plaintiff necessarily depended for the protection of her interests. It does not appear that any effort was made by the trustees to obtain an advantageous sale, but that they attended the sale and bid in the property for themselves and their partner, Jerrauld, for one-half its value, leaving a deficiency of $6,700, which they paid out of the trust fund.

No actual fraud on the part of the defendants is alleged or found, nor is it necessary that there should be. The object of the rule which precludes trustees from dealing for their own benefit, in matters to which their trust relates, is to prevent secret frauds by removing all inducement to attempt them. (*Keech* v. *Sandford*, 3 Eq. Cas. Abr., 741; *Whelpdale* v. *Cookson*, 1 Ves., Sr., 8; *Davoue* v. *Fanning*, 2 J. Ch., 252; *Case* v. *Carroll*, 35 N. Y., 385.)

It is urged, on the part of the appellants, that this rule is not applicable to the present case, because the mortgaged premises formed no part of the trust estate. This objection was answered by Chancellor WALWORTH, in the case of *Van*

Epps v. *Van Epps* (9 Paige, 241), by saying that the rule is not confined to trustees or others who hold the legal title to the property to be sold, but applies universally to all who come within its principle, which is, that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account. In the case cited, the chancellor held that the holder in trust of a junior mortgage owed a duty in case of the foreclosure of a prior mortgage on the same premises, to make the mortgaged premises produce at the sale as much as possible, and that he was thereby precluded from becoming a purchaser at the sale under the first mortgage. That case is very analagous to the present one. It was just as essential to the protection of the trust fund that the premises sold under the Woodruff mortgage should bring their value, as if the fund had been secured by a second mortgage on the same premises. In either case, to whatever extent the mortgaged premises should fall short of producing their full value, the loss would fall directly on the trust fund. The duty to protect the trust fund was the foundation, in both cases, of the duty in reference to the premises sold. Identity of the security was not essential. We have examined the recent case of *Hickley* v. *Hickley* (Law Rep., 1 Ch. Div., 190), but do not find in it any thing which changes our view of the present case.

The argument that the defendants benefited the sale by becoming bidders is one which might be used in every case where a trustee bids at a sale of property to which his trust relates. It has been so often used and so often refuted that it is not necessary to consider it here.

The provision in the decree of foreclosure, that any of the parties to the action might become purchasers at the sale, is no protection to the purchaser in a case like the present, neither can the confirmation of the sale have any such effect. The rights and equities of the plaintiff, as between her and her trustees, were in no form or manner before the court, or

involved in the action; nor is it the purpose of the ordinary provision allowing any party to the action to purchase, to affect equities which may exist between the purchaser and any other person for whose benefit the purchase may be deemed to have been made. Such a provision, in foreclosure cases, is usually inserted for the purpose of removing any doubt as to the right of the complainant, who conducts the suit and the sale, to become the purchaser. If the purchaser, though a party to the action, is acting in a fiduciary capacity arising outside of the relation of mortgagor and mortgagee, his liability to his *cestui que trust* cannot be affected by such a provision, nor by the order confirming the sale. (*Gallatin* v. *Cunningham*, 8 Cow., 377, 381; *Torrey* v. *Bank of Orleans*, 9 Paige, 661; *Conger* v. *Ring*, 11 Barb., 356.)

The decree of the surrogate, settling the accounts of the executors is not a bar to this action. So far as their accounts as executors are concerned, it is conclusive only so far as declared by the statute. (2 R. S., 94, § 65.) So far as their accounts as trustees are concerned, it is conclusive only as to the matters embraced in the accounts, or litigated or determined on the settlement. (Id., § 66, as amended by Laws of 1866, chap. 115.) The right of the plaintiff to the benefit of the purchase, made by the executors at the foreclosure sale, and to have a trust declared in her favor in the premises purchased, was not embraced, nor was it litigated or determined on the accounting, nor were the proper parties before the surrogate, to have enabled him to adjudicate upon it, even if he had had the power so to do. He, however, had no jurisdiction to declare a trust; all that he could do was to settle the accounts of the trusts created by the will.

The defendant Jerauld claims that the purchase should not be disturbed, so far as his interest is concerned, he not being either executor or trustee. But he was the partner of Whitney and Trott at the time of the sale, and cognizant of all the facts and of the rights and equities of the plaintiff. He, therefore, stands in no better position than the trustees with whom he was associated in the purchase, but is affected with whatever

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legal disability attached to them. (*Cumberland Coal Co.* v. *Hoffman Co.*, 16 Md., 456; *Cumberland Co.* v. *Sherman*, 30 Barb., 553.)

The judgment was as favorable to the defendants as the circumstances of the case would permit, and we see no reason to disturb it. It should, therefore, be affirmed for the amount agreed upon by the stipulation of the parties, dated April 13, 1876, with interest and costs.

All concur, except CHURCH, Ch. J., not voting; MILLER, J., absent.

Judgment affirmed.

ISAAC MILLER, Respondent, *v.* JOHN S. BARBER et al., Appellants.

66	558
130	175
66	558
164	241

To maintain an action to recover damages for deceit, in inducing plaintiff to purchase worthless property, it is not necessary to show a return or offer to return the property. The action is *ex delicto*, and not upon contract, and an averment in the complaint of an offer to return may be disregarded.

If the action be brought on the promise implied against a fraudulent vendor, that he will restore the consideration paid by the vendee upon his electing to rescind the contract, plaintiff is bound to aver and prove a return or offer to return the property upon discovery of the fraud.

Where the copy of pleadings, furnished the court upon trial, contains a reply to a counter-claim set up in the answer, it is within the discretion of the court whether to receive proof that no reply was, in fact, served or to leave defendant to his remedy by motion after trial, and its determination is not reviewable here.

A corporation was organized under the general manufacturing law for the purpose, as stated in its charter, of dealing in patent-rights and the manufacture and sale of patented articles. Defendant B. was president, and defendant S. secretary, and both took an active part in the organization. They, with the other promoters of the company, had purchased for $8,500 an interest in a "patent hay-loader," giving their notes for most of the purchase-money. The scheme to organize the company was set on foot to realize means to relieve themselves from liability thereon and to secure advances. The interest in said patent was conveyed to the company, and was the only property held by it to represent its nominal capital of $35,000. To promote the sale of stock, and give

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credit to the enterprise, various prominent men were solicited and induced to subscribe for stock, giving their notes therefor upon a secret agreement, which was carried out, that the notes should be given up without payment. Plaintiff was induced to subscribe for $500 of the stock, giving his note therefor, payable to defendants or bearer, upon representations of defendant B, that the invention was of great value, accompanied by a statement of the names of the stockholders; B. including in the list the names of those who had subscribed under the secret agreement. The negotiations were had in the office of defendant S., used as the office of the company; he was in another room at the time. Stock was also sold to others upon similar representations, and enough was realized from sales to pay the advances and liabilities of the original purchasers of the patent. Plaintiff's note was sold before maturity, and plaintiff paid the same. In an action to recover damages for fraud, the evidence tended to show that the patent was of no value. *Held*, that the evidence was sufficient to sustain the action, as the representation of the value of the invention was accompanied with a false representation of an extrinsic fact, calculated to, and which did, put plaintiff off his guard, and induced him to give credit to the statement of value.

Also, *held*, that the representations so made by B. were properly received in evidence as against S., the evidence showing that he knew, from its inception, of the scheme for securing fictitious subscriptions, and that he accepted the benefits resulting from the fraud.

This evidence was received before the connection of S. with the company had been shown; it was not offered or received to show him a party to the fraud. *Held*, no error, as the order of proof was within the discretion of the court.

Also, *held*, that evidence of representations made by defendants to others of a similar character with those made to plaintiff, and made about the same time under similar circumstances, was competent.

The court charged that the rule of damages was the difference between the value of the stock as represented and as it was, but refused to charge that no recovery could be had because no proof of difference in value had been given. *Held*, no error; that the value of the stock depended upon the value of the invention, as the company had no other property; and that from the representation that the invention was a valuable one the jury had a right to assume, as against defendants, that if the representation had been true the stock would have been worth what plaintiff paid.

The court having charged in substance that the jury must be satisfied from the evidence that defendants were guilty of the fraud charged before a verdict could be found against them, was requested by defendants' counsel to charge that they must be satisfied by clear and substantial proof. *Held*, no error.

(Argued June 2, 1876; decided September 19, 1876.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment on a verdict. (Memorandum of decision below, 4 Hun, 802.)

This action was brought to recover damages sustained in the purchase of certain stock by plaintiff of defendants, which purchase was alleged to have been induced by fraudulent representations on the part of defendants.

The complaint alleged, in substance, that defendants falsely and fraudulently represented that they had organized a company under the name of the Union Patent Right Company, of which defendant Barber was president and the defendant Schermerhorn was secretary, which owned the right to sell in certain specified counties a patent right for an invention known as "the hay-loading pitchfork," which was purchased cheap and was very valuable; that various individuals named and well known to plaintiff as men of character and pecuniary responsibility had taken shares, giving their notes therefor; that, relying on such statements and representations, plaintiff subscribed for one share of the stock, giving his note for its nominal par value, to wit, $500, payable to the defendants or bearer, which note was transferred to a *bona fide* holder before maturity, and plaintiff was compelled to, and did, pay the same; that defendants, for the purpose of cheating and defrauding plaintiff and others, had devised and carried out the scheme of organizing said company, and had procured various individuals, whose names were mentioned as aforesaid, to become apparent stockholders and to give their promissory notes for stock under the secret agreement that said notes were not to be paid, but were to be given up after being used to induce others to purchase stock, which notes were subsequently given up, and that the stock of said company and said patent and invention were utterly worthless. The complaint also alleged that upon the discovery of the fraud plaintiff tendered back the certificate of stock received by him and demanded the amount of money paid by him upon the note.

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The defendants answered separately. The defendant Barber's answer set up a counter-claim for more than the amount of plaintiff's claim alleged to have arisen out of another contract subsequent to the sale in question.

On the opening of the case on the trial, defendant Barber asked the court to direct a verdict for him on the ground that no reply had been served to the counter-claim. The copy pleadings furnished to the court contained a reply. Barber offered to prove that in fact no reply was served. The court refused the offer, holding that if no reply was in fact served, defendant must seek his remedy by motion after judgment.

Plaintiff proved the facts substantially as alleged in the complaint, except the alleged offer to return the stock, which was not proved. Proof was offered and received, under objection and exception, as to the alleged representations before any proof of the organization of the company. It appeared that the representations were made by Barber, Schermerhorn not being present. The conversation was had in a back room in Schermerhorn's office, he being in the front room. This office was used as the office of the company. Evidence as to the conversation with Barber was objected to as against Schermerhorn; the court overruled the objection. After the conversation with Barber, plaintiff went into the other room where Schermerhorn was, who asked him if he had any of the stock, plaintiff answered that he had not, that he hadn't the money to pay. Schermerhorn replied, in substance that he would have to pay no money, but simply to give a note, and before it became due the dividends would pay it, and told of some persons who had subscribed — naming some who had subscribed under the secret arrangement. Plaintiff went back into the other room, and, after some further conversation with Barber, subscribed, gave his note, and took a certificate signed by Barber, as president, and Schermerhorn, as secretary of the company. It appeared that the interest in the patent-right was purchased by defendants and others for $8,700, they paying a small portion in money, and giving their

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notes for the residue. That the company was organized under the general manufacturing law, the patent-right transferred to it, and that it had no other property of any kind; its nominal capital was $35,000, divided into shares of $500 each. The object of the scheme was to enable its projectors to realize enough to pay what they had advanced, and the amount of their notes, out of *bona fide* subscribers.

The only testimony on the subject of damages was evidence tending to show that the invention was worthless.

Plaintiff was permitted to prove, under objection and exception, that representations, similar to those made to him, were, at or about the same time, made by defendants to other persons for the purpose of inducing them to subscribe for and take stock.

The defendants' counsel requested the court to charge, among other things, that unless the plaintiff is in a position to ask a rescission of the contract, then he cannot recover under the complaint in this case for the fraud, as no proof has been given as to the difference between the value of the stock, as represented, and as it in fact was. The court refused so to charge, and defendants' counsel excepted.

Said counsel asked the court to charge, that the rule of law in regard to damages is the difference between the value of stock as it was represented to be, and as it was in fact. The court so charged.

The defendants' counsel then requested the court to charge that no evidence has been given as to the difference in the value of the stock. The court declined so to charge, stating that some evidence has been given bearing upon that question, to which defendants duly excepted.

The court having charged in substance, that the jury must be satisfied from the evidence, that defendants were guilty of the fraud charged before they could find a verdict against them; was requested to charge: "That the jury must be satisfied the plaintiff has made out his cause of action by clear and substantial evidence," to which the court replied: "I do not charge that proposition in the language expressed;

I only charge you that you must be satisfied by the evidence in the case that the plaintiff has proved his cause of action. That the evidence establishes his cause of action, in order to entitle him to recover, I decline to say; it must be in clear and substantial evidence." To the refusal to charge said counsel duly excepted.

M. M. Waters for the appellants. The court erred in holding that this action was for fraud. (52 Barb., 570; 56 N. Y., 87; 59 id., 156; 51 id., 108; 50 id., 1; 51 id., 27.) Plaintiff was bound to establish, by at least *prima facie* evidence, the common intent or unlawful design, before proving the acts and declarations of defendant Barber against defendant Schermerhorn. (33 Barb., 165; 39 id., 403; 40 N. Y., 221; 4 Lans., 214, 228.) It was competent to show representations similar to those made by defendants to plaintiff at about the same time. (1 Hun, 344; 11 How., 242; 51 Barb., 116; 2 Rob., 500; 4 Abb. [N. S.], 431; 9 id., 357; 5 Bosw., 344; 4 Lans., 214; 47 Barb., 404; 1 Greenl. Ev., §§ 51–53.) The representations as to value averred in the complaint were not sufficient to constitute a cause of action. (51 N. Y., 27; 56 id., 83.) Without proof as to the difference between the value of the stock as represented, and as it in fact was, plaintiff was not entitled to recover under the complaint for fraud. (55 Barb., 615; 52 id., 570; 6 Rob., 502; 51 N. Y., 108; 50 id., 4, 5; 52 id., 570; 53 id., 307, 316.) The court erred in holding that a reply had been served. (15 N. Y., 425; 17 id., 227; 28 id., 438; 7 id., 476; 11 How., 11, 24; 22 How., 104; 52 Barb., 570; 6 Rob., 502.)

Geo. N. Kennedy for the respondent. The allegations in the answer did not contain facts sufficient to constitute a counter-claim. (37 N. Y., 409; 4 Tr. Apps., 332; 5 Dyer, 332; 5 Bosw., 648.) The alleged counter-claim did not grow out of the transaction or form a part of it, but was predicated upon a subsequent arrangement, and was not the subject of a counter-claim. (*Chambers* v. *Lewis*, 11 Abb., 210; *Patterson* v. *Richards*, 22 Barb., 143, 327; 37 N. Y., 402; Code, § 150.)

Opinion of the Court, per ANDREWS, J.

ANDREWS, J. The objection was taken on the trial, that the plaintiff could not maintain the action, for the reason that he did not return or offer to return to the defendants the certificates of stock in the "Union Patent Right Compay," issued to him on his subscription to the capital stock, within a reasonable time after the discovery of the alleged fraud.

The validity of this objection depends on the character of the action. The complaint contains all the allegations essential in an action for deceit in inducing the plaintiff by fraudulent representations to purchase a worthless stock. The *scienter* was sufficiently averred. (25 N. Y., 244.) The summons was for relief and judgment was demanded for the damages sustained by the plaintiff. The action was *ex delicto* and not upon contract. The form of the summons and the demand for relief in connection with the allegations of the fraud characterize it. If the action had been brought upon the promise which the law implies against a fraudulent vendor of real or personal property to restore the consideration paid by the vendee upon his electing to rescind the contract, then the plaintiff would have been bound to aver and prove that upon discovery of the fraud he had returned or offered to return what he had received upon it. But an action for damages for the deceit is brought consistently with an affirmance of the contract of sale, and the judge properly held on the trial, that the averment in the complaint of an offer to return the certificate might be disregarded as surplusage. (*Hubbell* v. *Meigs*, 50 N. Y., 487.)

The answer of the defendant Barber contains a counter-claim, arising out of an alleged contract between the plaintiff and Barber, made subsequent to the sale of the stock. The copy of the pleadings furnished to the court by the plaintiff contained a reply denying the alleged counter-claim. The defendant Barber thereupon offered to prove that in fact no reply had been served, as was claimed by the plaintiff. The judge refused to hear the proof and ruled that the case should proceed upon the pleadings furnished, leaving the defendant to his remedy by motion after the trial. This was the former practice in respect to the *nisi prius* record (*Wood*

v. *Buckley*, 13 J. R., 486), and it was, we think, within the discretion of the judge to refuse to enter into this collateral issue at that stage of the proceedings. Moreover, the facts upon which the alleged counter-claim arose were shown upon the trial, and they were insufficient to establish a counter-claim in the action.

In order to understand the force of objections taken on the trial by the defendants to the admission of evidence, it is proper to refer to the general features of the case as disclosed by the testimony. The "Union Patent Right Company" was a corporation organized under the general law for the formation of manufacturing and other corporations, passed February 17, 1848. The certificate was dated December 23, 1865, and was filed in the office of the secretary of State, January 13, 1866. The object of the corporation stated in the certificate, was the dealing in patent rights and the manufacture and sale of patented articles. The capital stock was fixed at $35,000, divided into shares of $500, each. The defendants and five other persons were named as trustees for the first year. The defendants Barber and Schermerhorn were elected respectively president and secretary of the company, and the salary of the former was fixed at $500 a month. Both of the defendants took an active part in the organization of the company, and the office of the defendant Schermerhorn was also for a considerable time the office of the company. The promoters of the company shortly before it was organized, had purchased for the sum of $8,500, an interest in a patent "hay-loader," and had given their notes for the principal part of the purchase-money. These notes were outstanding, and the scheme was set on foot to organize a corporation on the basis of this property, and by sales of stock to realize the means for the payment of their liabilities and to secure themselves for their advances. The interest in the patent was conveyed by the owners to the company soon after its organization, and was the only property which the company had to represent its nominal capital of $35,000. Both defendants were interested

in the original purchase of the patent and both were to be benefited by sales of stock. In order to promote the sale of stock various individuals of prominence in the community were solicited to subscribe for stock and give their notes for the amount of their subscriptions so as to give credit to the enterprise, upon the secret agreement, however, that the notes should be given up after a short time without payment. In several instances subscriptions were made and notes were given upon this understanding, which were subsequently surrendered in pursuance of it to the makers. These subscribers neither received the stock or paid their subscriptions. The plaintiff subscribed for one share of the stock and gave his note for the full par or nominal value of the share. But he was not one of the persons with whom the agreement referred to was made. His note was payable to the defendants or to one of them, and was transferred before maturity in part payment of notes given by the defendants and others to the patentee on the original purchase, and he was subsequently compelled to pay it. The negotiation with the plaintiff which resulted in his subscription to the stock was conducted by the defendant Barber in the back office of the defendant Schermerhorn, who at the time was in the front office and did not hear the conversation. The invention was represented by Barber to be of great value. He mentioned the names of the persons who had taken stock in the company, and these were persons who had allowed their names to be used and had given their notes to aid the enterprise, but who never took, and were never expected to take, stock in the company. Stock was sold to other parties under similar circumstances, and upon similar representations. Enough was realized from the sales to pay the advances and liabilities of the original purchasers of the patent. Some effort was made to introduce and sell the right to use the invention, but after a short time they were discontinued. No dividends were ever earned or paid by the company and there was evidence tending to show that the invention was of no value.

It cannot be doubtful that an action lies for the fraud

practiced upon the plaintiff. The representation of the value of the invention was connected with a false representation of an extrinsic fact calculated to impose upon the plaintiff, tc put him off his guard and to induce him to give credit to the representation of value. It had the effect it was designed to have. He relied in taking the stock in part upon the supposed judgment of other persons who, as he was falsely informed, had taken stock in the company.

It is earnestly insisted in behalf of the defendant Schermerhorn that the evidence is insufficient to connect him with the fraud. It is true that he made no direct representations to the plaintiff. But the evidence warrants the conclusion that he knew from its inception of the scheme for securing fictitious subscriptions in aid of the sale of the stock and that he accepted the benefits resulting from the fraud.

The judge permitted the declarations made by the defendant Barber during his negotiation with the plaintiff for the sale of the stock to be given in evidence as against the defendant Schermerhorn before his connection with the company had been shown. The evidence was competent as against Barber. It became competent as against Schermerhorn, when by the facts subsequently proven his connection with the fraud was *prima facie* shown. The declarations of Barber were not competent to show that Schermerhorn was a party to the fraud, nor were they admitted for that purpose. But when evidence sufficient to submit to the jury had been given tending to show that the defendants were jointly engaged in a common scheme to defraud the plaintiff and others the acts and declarations of Barber in furtherance of the common design were admissible against both. The order of proof is in general a matter of discretion, and we are of opinion that no legal error was committed in allowing the declarations of Barber to be given in evidence, as against his co-defendant before proof of his connection with the conspiracy had been made. If the proof subsequently given had failed to connect Schermerhorn with the fraud, it would have been the duty of the court to have instructed the jury to disregard them

in considering his liability. (1 Greenl. Ev., § 111; *The People* v. *Parish*, 4 Den., 153; *Sweet* v. *Rodgers*, 6 T. R., 118; *Page* v. *Parker*, 40 N. H., 62.)

The plaintiff was permitted to prove representations made by the defendants to other persons, at or near the same time, and of a similar character as those made to the plaintiff, and under similar circumstances. This was competent upon the question of fraudulent intent. (*Cary* v. *Houghtaling*, 1 Hill, 311; *Hall* v. *Naylor*, 18 N. Y., 588.)

The court, in accordance with the request of the defendant, instructed the jury that the rule of damages was the difference between the value of the stock as it was represented to be and as it was in fact, and refused to charge that no recovery could be had because no proof of difference in value had been given. The value of the stock depended upon the value of the invention. The company had no other property. The jury were authorized to find that the invention was without value, and from this fact that the stock was valueless, also. The defendant represented that the invention was a valuable one; and as against the defendant, the jury could assume that if the representations had been true the stock would have been worth what the plaintiff paid for it. (*Page* v. *Parker*, 40 N. H., 47.) The court properly refused to charge as requested.

The court having charged in substance that the jury must be satisfied from the evidence that the defendants were guilty of the fraud charged, before they could find a verdict against them, was then asked to charge that the jury must be satisfied by clear and substantial proof. The charge as made stated the correct rule of law upon the subject, and the court was not bound to charge in the words used by the defendants.

There are many exceptions to evidence, and to the charge, not here noticed; we have examined them, and are of opinion that none of them are well taken.

The judgment of the General Term should be affirmed.

All concur; MILLER, J., absent.

Judgment affirmed.

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IN THE MATTER OF THE PETITION OF THE DEANSVILLE CEMETERY ASSOCIATION TO ACQUIRE TITLE TO LANDS OF ISAAC C. MILLER AND WIFE.

The question whether the use for which private property is sought to be taken, under and by the exercise of the right of eminent domain, is public or private, is a judicial one, to be determined by the courts; the grant by the legislature of the right to take, is not conclusive evidence that the use is a public one.

The use of lands for the purposes of rural cemetery associations, incorporated under the general law (chap. 133, Laws of 1847, as amended by chap. 280, Laws of 1852, and chap. 245, Laws of 1874), is private, not public.

The provision, therefore, of the act of 1873 (chap. 452, Laws of 1873), authorizing the taking of lands for the purposes of such an association, by proceeding *in invitum*, is unconstitutional and void.

In re Deansville Cemetery Association (5 Hun, 482) reversed.

(Submitted June 6, 1876; decided September 19, 1876.)

APPEAL by Isaac C. Miller and wife, from an order of the General Term of the Supreme Court in the fourth judicial department, affirming an order of Special Term confirming the report of a referee and appointing commissioners to appraise the compensation to be paid appellants for certain lands proposed to be taken by the petitioner, for the purposes of its incorporation. (Reported below, 5 Hun, 482.)

The facts sufficiently appear in the opinion.

O. S. Williams for the appellants. The statutes under which these proceedings were taken are unconstitutional and void. (Const., art. 1, § 6; *Vose* v. *Cockroft*, 44 N. Y., 415; *Delaney* v. *Brett*, 51 id., 78; 2 Kent's Com., 339, 340, and notes [6th ed.]; *Townsend* v. *Morris C. and B. Co.*, 39 N. Y., 174, 182; *R. and S. R. R. Co.* v. *Davis*, 43 id., 144; *Bklyn Park Com.* v. *Armstrong*, 45 id., 244; *In re Fowler*, 53 id., 62; *Varrick* v. *Smith*, 5 Paige, 137; *Beekman* v. *S. and S. R. R. R. Co.*, 3 id., 45; *Bloodgood* v. *M. and H. R. R. Co.*, 14 Wend., 51; 18 id., 9; 5 Hun, 482.)

Opinion of the Court, per RAPALLO, J.

Dennison & Everett for the respondent. The propriety of taking private property for a public use is not a judicial question, but one of political sovereignty, to be determined by the legislature. (*People ex rel. Herrick* v. *Smith*, 21 N. Y., 595, 598; 42 id., 243, 244; *In re Townsend*, 39 id., 174; *Bloodgood* v. *M. and H. R. R. Co.*, 18 Wend., 9; *Haywood* v. *Mayor, etc.*, 3 Seld., 324, 325; *Beekman* v. *S. and S. R. R. Co.*, 4 Paige, 73; *Varick* v. *Smith*, 5 id., 159, 169.)

RAPALLO, J. This proceeding is instituted under the acts of the legislature in reference to acquiring title to real estate for burial purposes. The first act upon the subject was passed in 1869 (Laws of 1869, chap. 727), and authorized cities and villages owning burial grounds to acquire title to lands immediately adjoining such grounds, for burial purposes, by proceedings similar to those prescribed by the general railroad law for the acquisition of lands for railroad purposes.

This act was amended by the acts of 1870 (chapter 760), 1873 (chapter 452), and 1875 (chapter 206), so as to extend to incorporated cemetery associations. The present application is based upon the amendment of 1873 to section 1, which provides as follows:

"It shall be lawful for the common council of any city, the trustees of any incorporated village or the trustees of any incorporated rural cemetery association in this State (although such cemetery is disconnected from and out of the limits of any city or village) in cases where either such city, village or rural cemetery association needs lands, or an addition to what it has, for burial purposes, to purchase or acquire title to such lands," etc. etc.

The respondent is a cemetery association, incorporated under chapter 133 of the Laws of 1847. This act authorizes the formation of corporations for the purpose of procuring and holding lands to be used exclusively for the burial of the dead. It provides for the division of such lands into lots, under the direction of the trustees, and the sale by them of such lots upon such terms as shall be agreed. The first trus

tees are to be named in the certificate of incorporation; those succeeding them are to be elected by the lot owners. By the original act the lots descend to the heirs of the respective owners, but are inalienable except that heirs may release to each other. By chapter 245 of the Laws of 1874 (passed April 24, 1874, after the present proceedings were instituted, but before the order appealed from was made) the lot-owners were authorized, by leave of any court of record held in the county, to sell their lots, after the removal of the bodies interred therein.

By the act of 1847 (section 7, as amended by the act of 1852, chapter 280, section 1), the proceeds of lots sold by the trustees, are to be applied to the payment of the purchase-money of the lands acquired by the association and to the improvement and embellishment of the cemetery and incidental expenses, and to no other purpose.

The question argued before us on the present appeal is, whether the acts conferring upon these rural cemetery associations the right of eminent domain are constitutional and valid. It is claimed on the part of the appellants that they are invalid, for the reason that they assume to authorize the taking of private property for uses which are not public, but are private. The respondent maintains, first, that the legislature is the sole judge of the propriety of granting the right of eminent domain, and thus the courts cannot review its action; and secondly, that the use for which the lands in question are sought to be taken is, in fact, a public use.

The first point taken by the respondent has been too often considered by the courts to render discussion necessary. The right of taking the property of an individual without his consent is confined to those cases where the property is required for public use. Private property cannot be taken for private use even on making compensation. (*Taylor* v. *Porter*, 4 Hill, 140, and cases cited; *Embury* v. *Conner*, 3 N. Y., 511.) In both of these cases as well as in those referred to therein, the question whether the use for which the property was taken was public or private, was treated as a judicial question

and discussed and passed upon by the courts; and the same question has repeatedly been entertained in the numerous cases in the courts of this and our sister States in respect to granting the right of eminent domain to railroad corporations and authorizing the issue of town bonds for their benefit.

The cases cited by the counsel for the respondent, *People* v. *Herrick* (21 N. Y., 595); *Beekman* v. *Saratoga and S. R. R. Co.* (3 Paige, 73); *Varick* v. *Smith* (5 id., 159); *Blood-good* v. *Mohawk, etc., Railroad Co.* (18 Wend., 9); *Haywood* v. *The Mayor, etc.* (3 Seld., 324); *Matter of Townsend* (39 N. Y., 174); *Brooklyn Park Com.* v. *Armstrong* (45 id., 243); *App. of Fowler* (53 id., 62), do not establish the proposition that the grant by the legislature of the right to take property of an individual, without his consent, on making compensation, is conclusive evidence that the use for which it is to be taken is a public use. Nor do they dispute the power and duty of the courts to determine whether the use is public or private, for the purpose of ascertaining whether or not the action of the legislature is valid. In *The Matter of Townsend* (39 N. Y., 174), it is conceded that even an express declaration by the legislature, that the use was public, would not be controlling. These cases decide that where the uses are in fact public, the necessity or expediency of taking private property for such uses, by the exercise or the delegation of the right of eminent domain, the instrumentalities to be used and the extent to which such right shall be exercised or delegated are questions to be determined by the legislature, and not by the courts. Whether the use is in its nature private or public is the question upon which the right of the legislature to interfere with private property depends. All the cases concede this principle. Whether the use is of a public or private nature can only be determined by a judicial inquiry; and all the cases in which the action of the legislature condemning or authorizing the condemnation of private property has been sustained, are founded upon the concession or adjudication that the use for which the property is taken is, in its nature, public.

The point upon which the present case turns, therefore, is the nature of the use for which the land in question is sought to be taken. It is to be vested in trustees, with power to divide into lots and sell these lots to individual owners. It is difficult to see what interest the public will have in the lands or in their use. No right on the part of the public to buy lots or bury their dead there is secured. The prices at which the lots are to be sold are to be fixed by private agreement; the corporation is to be managed by trustees elected by the lot owners. The lots, or the rights of the owners therein, are to descend as private property to the heirs of these owners; and by the act of 1874 the owners may, by leave of the courts, sell their lots and put the proceeds in their pockets. The substantial right of enjoyment of the property is vested in the individual lot-owners; and the whole effect of the incorporation of these cemetery associations is to enable a number of private individuals to unite in purchasing property for their own use and that of their descendants as a place of burial, and to secure a permanent management of it through the instrumentality of trustees appointed by themselves and subject to no other control, with the privilege, when they cease to use their lots as a place of burial, to sell them and receive the proceeds for their own benefit.

It is argued that the property is to be used as a place of burial and that the burial of the dead is a public benefit, and therefore, the use is public. But the answer to this argument is, that the right of burial in these grounds is not vested in the public or in the public authorities, or subject to their control, but only in the individual lot-owners. If the fact that it is a benefit to the public that the dead should be buried is sufficient to make a cemetery a public use, the legislature might authorize A to take the land of B for a private burial place of A and his family. The fact that this land is taken for the benefit of a number of individuals for division among themselves or their grantees for their own use as a cemetery,

makes the case no stronger than if taken for the benefit of a single individual.

The orders of the General and Special Terms should be reversed, with costs, and the application of the petitioner denied.

All concur.

Ordered accordingly.

WALTER MARKHAM, Respondent, *v.* USEBA STOWE et al., Appellants.

N. granted to defendant U. "all the water that will run through a lead pipe with a three-eighths of an inch bore from a spring or well," on the premises of the grantor, with the privilege of conveying the water in a lead or wooden pipe from the spring to a public highway. *Held*, that the reference to the size of the pipe was not simply as a measure of the water granted, but that defendant was restricted to the use of a pipe with a bore of three-eighths of an inch, all the way from the spring to the highway; and, it appearing that although the water was taken from the spring through a short piece of lead pipe of the size specified, then through a larger pipe to the highway, and was discharged through a faucet but two-eighths of an inch in diameter, more water was drawn than would run through a pipe of the uniform size of three-eighths of an inch, that an action could be maintained, restraining defendants from using a larger pipe for any portion of the distance.

(Argued June 7, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought to restrain defendants from the use of wooden pipe, with a bore of an inch and five eighths, which was being used by them to take water from a spring upon plaintiff's premises, or from using any pipe, for that purpose, with a bore greater than three-eighths of an inch.

In 1865, one Whitman Newell, who was then the owner of plaintiff's premises, granted to defendant, Useba Stowe, "all the

Statement of case.

water that will run through a lead pipe with a three-eighths of an inch bore, from a spring or well of water now owned by the said Newell, and about a rod and a-half west of his house, on the premises owned and occupied by him in the town of Ellington, in said county, and known as the old Dunham farm (being formerly owned by Nathaniel Dunham), with also the right and privilege of conveying said water in a lead pipe, or wooden pipe, from said spring in a southerly direction, a distance of about fifteen rods (to the public highway), running from Bucklin's Corners to the village of Ellington, said pipe to be laid at least two feet beneath the surface of the ground."

The court found the following facts: That at the commencement of this action the defendants had a lead pipe inserted into the spring an inch and a quarter in diameter, from two to three inches long, and extending into the end of a pump log terminating at the edge of the spring; that this pump log was joined to others extending over the distance from the spring to the defendants' residence, about eight rods south of the said highway and twenty-six rods from the spring. These pump logs contained an aperture or bore of one and nine-sixteenths of an inch in diameter, through which the water was conducted from the spring to the defendants' residence, and there it was discharged by a faucet about two-eighths of an inch in diameter, and that the defendants received from said spring all the water that would run through said pump logs and faucet at the dwelling-house aforesaid; that after the commencement of the action, in the year 1872, the short piece of lead pipe at the spring was changed from the inch and a quarter bore to one of three-eighths of an inch in diameter, but the wooden pipe remained unchanged from the spring to the defendants' dwelling-house, and the defendants continued to receive from said spring all the water that would run through said pipe, pump log and faucet; that more water was discharged through the faucet at the dwelling-house of the defendants and obtained by the defendants from the spring prior to the time in May, 1872, when the short lead pipe at the spring was changed from a pipe one and one-quar-

ter of an inch bore to a pipe three-eighths of an inch in diameter than would run through in the same length of time a lead or wooden pipe with three-eighths of an inch aperture extending from the spring to the highway; that more water was discharged through the faucet at the dwelling-house of the defendants and obtained by the defendants from the spring after the change made in the short lead pipes in May, 1872, and until the commencement of this action, than in the same length of time would run through a lead or wooden pipe with a three-eighths of an inch bore from said spring to said highway.

As conclusions of law, the court found that no more water was conveyed than would run from the spring through a lead or wooden pipe with a three-eighths of an inch aperture, and directed judgment restraining defendants from taking more or from using a pipe having a larger bore than three-eighths of an inch between the spring and the highway.

Wm. H. Henderson for the appellants.

Obed Edson for the respondent.

Per Curiam. The only point properly before this court for review is as to the construction of the grant. The fact that, up to 1872, the defendants drew more water from the spring than would have been drawn through a pipe from the spring to the highway with three-eighths of an inch bore, although the faucet, at the point of discharge, was only two-eighths of an inch orifice; and the fact that subsequent to that time, with the use of a short lead pipe from the spring to the wooden pipe, which had a larger bore, the defendants also drew more water than would run through a three-eighths inch pipe from the spring to the highway, are sustained by the evidence, and the findings are conclusive upon this court. The grant was of "all the water that will run through a lead pipe with a three-eighths of an inch bore, from a spring or well," * * * "with, also, the right and privilege of conveying

said water in a lead pipe or wooden pipe from said spring, in a southerly direction, a distance of about fifteen rods to the public highway." The plaintiff claims, and the court below held, that the defendant was restricted to a pipe with a bore of three-eighths of an inch all the way from the spring to the highway. The defendants claim that the first clause of the grant is only a measure of the water authorized to be taken, and not a restriction upon the size of the pipe, and, at all events, that if the size of the pipe at the spring is only three-eighths of an inch, a larger pipe may be used the remainder of the distance.

There is considerable force in the position of the defendants, but looking at the language employed, the object of the parties, and all the circumstances, we are inclined to adopt the construction of the court below, as being more in harmony with what appears to have been the intention of both parties than the other. This construction makes the quantity fixed and certain. It is probable that the grantor intended to restrict the quantity to what would pass through a three-eighths inch bore all the way to the highway, with a view of reserving sufficient to supply amply his own farm. The consideration was merely nominal, and it is evident that it was intended to grant only what was regarded as the surplus. This would be secured more certainly by the construction adopted than by the other. The language of the two clauses bears more naturally this interpretation. When read together, the practical meaning is that the grantee might draw water from the spring to the highway in a lead or wood pipe, with a three-eighths of an inch bore. It requires a critical and technical construction to hold that the size of the pipe was not intended to be restricted, and that the reference to the size was only designed as a measurement of the water granted. Without elaborating the point, we concur with the opinion of DANIELS, J.

The judgment must be affirmed.

All concur.

Judgment affirmed.

Statement of case.

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ALBERT G. SAGE, Appellant, *v.* JOHN H. WOODIN et al., Respondents.

The personal representatives of a deceased member of a firm may adjust and settle the partnership affairs with the surviving partners, and, in the absence of fraud or mistake, the settlement is conclusive upon the parties, and upon all persons claiming through them, including the creditors of the deceased partner.

In March, 1866, plaintiffs obtained judgment by default against C., and levied upon his interest in a stock of goods of a copartnership of which he was a member; by stipulation the judgment was opened, and C. allowed to come in and defend, all proceedings on the execution to be suspended "until otherwise ordered;" directions to that effect were given to the sheriff, and the firm continued its business without interference. C. died in July 1867; his administrators had an accounting and settlement with the surviving partners, who did not know of the levy, and C.'s interest in the firm was, for a good consideration, transferred by the administrators to W., one of the survivors. The administrators were substituted as defendants in C.'s place in said action. In March, 1868, judgment was perfected therein in favor of plaintiff, whereupon the sheriff, by direction of plaintiff's attorney, sold the interest of C. in the partnership assets, and plaintiff became the purchaser. In an action brought by him against the surviving partners for an accounting, *held*, that the execution had, by the conduct of the plaintiff, and the delay of the sheriff under his directions, become dormant as against *bona fide* purchasers, in which position W. stood; and that the settlement and transfer made by C.'s administrators were conclusive upon plaintiff.

It is not necessary in such case that the execution creditor should have acted in bad faith, or with intent to defraud in delaying the execution, to make it dormant as to third persons.

(Argued June 7, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought for an accounting and to recover the interest of Charles E. Case in the assets of the firm of Case, Woodin & Conger, in which firm said Case was a partner

at the time of his death, and which interest plaintiff claimed to have purchased on execution sale.

The facts sufficiently appear in the opinion.

S. N. Dada for the appellant. The delivery of an execution to the sheriff in the lifetime of the defendant binds his personal property and authorizes a sale after his death, although no actual levy was made previous to his death. (*Becker* v. *Becker*, 47 Barb., 498; *Selden* v. *Wells*, 29 N. Y., 490.) Plaintiff, by the purchase at the sheriff's sale, became a tenant in common with defendants of the partnership effects, and upon the dissolution of the firm acquired all the rights and was subject to all the equities of C. E. Case in the firm. (Col. on Part., §§ 112–162; Story on Part., §§ 311, 312; 3 Kent's Com., 59; *Smith* v. *Owen*, 42 N. Y., 132.) Defendants are bound to account to plaintiff for the profits realized in the business up to the time of trial. (Col. on Part., §§ 325–336; *Crawshay* v. *Collins*, 15 Ves., 218; *Featherstonhaugh* v. *Fenwick*, 17 id., 298; *Brown* v. *De Tastel*, 1 Jacobs' Ch., 284; *Cook* v. *Coolingridge*, id., 608; *Ogden* v. *Astor*, 4 Sandf., 311; Story on Part., § 349; *Washburn* v. *Goodman*, 17 Pick., 519; *Dyckman* v. *Valiente*, 42 N. Y., 549; *Sigourney* v. *Munn*, 7 Conn., 11.) Surviving partners are not entitled to compensation for collecting the debts, adjusting the accounts and winding up the affairs of the concern. (3 Kent's Com., 64; Col. on Part., § 199; Story on Part., § 331; *Washburn* v. *Goodman*, 17 Pick., 519.)

George G. French for the respondents. Plaintiff had no right to treat the stay of the execution as a nullity. (*Starr* v. *Francis*, 22 Wend., 633; *Roosevelt* v. *Gardinier*, 2 Cow., 463; *Jackson* v. *Jackson*, 3 id., 73; Bouv. L. Dict., 542.) The settlement as to the partnership and transfer of the interest of C. E. Case, deceased, between his administrators and defendants, was conclusive upon the rights of plaintiff herein. (*Newell* v. *Doty*, 33 N. Y., 83, 93; *Jones* v. *Osgood*, 6 id., 233, 235; *Goodrich* v. *Thompson*, 44 id., 325, 335; *Taylor* v. *Ketchum*, 5 Robt., 520; 35 How. Pr., 302; *Ogden* v. *Astor*,

4 Sandf., 312, 332–335.) The pretended levy of December 24, 1866, created no lien as against defendants. (2 R. S., 366, § 17; *Birdseye* v. *Ray*, 4 Hill, 158; *Millspaugh* v. *Mitchell*, 8 Barb., 333; *Bond* v. *Willett*, 1 Keyes, 377; 29 How. Pr., 47; *Camp* v. *Chamberlain*, 5 Den., 198, 202; *Roth* v. *Wells*, 29 N. Y., 471, 485, 489; *Westervelt* v. *Pickney*, 14 Wend., 128; *Price* v. *Shipps*, 16 Barb., 585; *Menagh* v. *Whitwell*, 52 N. Y., 146–158; Pars. on Part., *360 [2d ed.]; *Ingalls* v. *Lord*, 1 Cow., 240; *Hall* v. *Sampson*, 35 N. Y., 274; *Harris* v. *Murray*, 28 id., 574, 576; *Hickok* v. *Coates*, 2 Wend., 419; *Kellogg* v. *Griffin*, 17 J. R., 274; *Ball* v. *Shell*, 21 Wend., 222; *Knower* v. *Barnard*, 5 Hill, 377, 379; *Price* v. *Shipps*, 16 Barb., 585.) Evidence as to the business of the firm between its members and with others was competent. (A. & A. on Corps. [9th ed.], § 248, p. 225; 1 Phil. Ev., note, 177*, pp. 602, 603 [5th ed., 1868]; *Dalton* v. *Daniels*, 1 Hilt., 472; *Read* v. *McAllister*, 8 Wend., 109; *Mer. Bk.* v. *Spicer*, 6 id., 443; 2 Wait's L. and Pr., 389; 1 Greenl. Ev. [12th ed., 1866], § 206.)

ANDREWS, J. The death of Charles E. Case operated as a dissolution of the firm of Case, Woodin & Conger, and the administrators of his estate upon their appointment became tenants in common with the survivors of the partnership property, subject to the right of the surviving partners to its possession and management for the purpose of closing up the partnership affairs. (Pars. on Part., 440.) The representatives of Case, as his successors in interest, were entitled to an accounting with the surviving partners and to receive his share of the surplus assets. In taking the account the interest of Case would be chargeable not only with his share of the partnership debts, but would be subject to a lien in favor of the other partners for any debt owing by him to the firm, and to any charge created by the partnership articles in their favor or in favor of either of them upon his interest in the partnership. (1 Lindley on Part., 702; Story on Part., § 348; *West* v. *Skip*, 1 Ves., 139; *Barker* v. *Goodwin*, 11 Ves., 85;) an

It was, however, competent for the representatives of Case and the surviving partners to adjust and settle by agreement between themselves the partnership affairs without an accounting or resort to legal proceedings. Such a settlement, in the absence of fraud, would be binding upon the parties to it, subject to be opened for the correction of errors or mistakes, in accordance with the practice and principles of courts of equity. (Parsons on Part., 511, 513; *Ogden* v. *Astor*, 4 Sand., 312.)

The referee finds that in the fall of 1867, after the death of Case, there was an accounting between his representatives and Woodin and Conger of the affairs of the firm of Case, Woodin & Conger and the previous firms of which Case and Woodin were members, and an adjustment and settlement of their respective rights and liabilities. The basis, and to a considerable extent the details, of the settlement are set out in the report.

It is sufficient here to state in general terms that the interest of Case in the firm of Case, Woodin & Conger remaining after payment of the debts was ascertained. This interest was transferred by the administrators to Woodin in consideration of his assuming and paying the debts of Case and Woodin, for which both were liable, and discharging the estate of Case from his individual indebtedness to Case, Woodin & Conger and to the previous firms. In addition, and as part of the settlement, the administrators of Case paid to Woodin $268.74, that being the excess which, on the accounting, was found to be due from the estate to him, after applying Case's interest in the firm as stated. The referee also found that, by the partnership agreement of Case, Woodin and Conger, made on the organization of that firm in 1866, it was agreed that the interest of Case in the new firm should be charged with the payment of his liabilities as a partner in the previous firms. The settlement, in the absence of fraud or mistake, was conclusive upon the parties and upon all persons claiming through them. The general creditors of Case were bound by it as the act of his legal representatives.

Opinion of the Court, per ANDREWS, J.

The plaintiff, on the 21st day of December, 1866, recovered a judgment in the Supreme Court against Case. Execution on the judgment was issued December 24, 1866, and the sheriff, on the same day, by virtue of the writ, levied upon the interest of Case, in the goods of Case, Woodin & Conger, in the store occupied by the firm. In March, 1868, fifteen months after the levy, the sheriff advertised and sold the interest of Case in the partnership assets under the execution, and the plaintiff became the purchaser for the sum of thirty dollars. The sale was subsequent to the death of Case, and also to the settlement between his representatives and the surviving members of the firm. The plaintiff, claiming by this purchase to have acquired the interest of Case, Woodin & Conger as it existed December 26, 1866, brings this action for an accounting, and insists that the settlement made in the fall of 1867, between Case's administrators, and the survivors of the firm does not conclude or bind him, for the reason that the interest of Case was bound by the levy, and that the title of the creditor, when perfected by a sale on the execution, rendered null and void the settlement and the transfer made by the representatives of Case to Woodin. The plaintiff claims to stand in the same position and to have the same rights as if the settlement and transfer had not been made, and to be entitled to an accounting, *de novo*, as to Case's interest in the partnership, and of the profits on his share in the business after his death.

The defendant Woodin, upon the facts found by the referee, was a *bona fide* purchaser of the interest of Case in the partnership. Upon the faith of the settlement, and in consideration of the transfer to him of that interest, he assumed liabilities against his estate, and discharged claims in his own favor, growing out of the previous partnerships, and neither he or Conger had any notice or knowledge of the execution or levy at that time, and not, as the referee finds, until the sale in March, 1868.

The plaintiff insists that the evidence did not authorize the finding of the referee, that Woodin was a purchaser without

notice of the levy. The deputy sheriff, who held the execution and made the levy, testified that he notified the defendant Woodin of the levy January 24, 1867. This was contradicted by Woodin; and both defendants testified that they had no notice until after the death of Case. The sheriff did not claim that he gave notice at any time, except in January, 1867. The sheriff had then been directed by the attorneys for the plaintiff to suspend further proceedings on the execution, until otherwise ordered, and the direction was not withdrawn until March, 1868. The conduct of the officer when the alleged levy was made, indicates an intention to conceal the fact from the partners of Case, and in view of all the circumstances, we think the referee was justified in his conclusion upon the question of notice, at least we cannot say that there was no evidence to support it.

It is not, however, alone sufficient to support the title of Woodin as against the lien of the execution, that he was a *bona fide* purchaser without notice of the levy. The title of a *bona fide* purchaser of goods from the execution debtor, after execution issued without notice and before actual levy, is protected by statute (2 R. S., 366, § 17); but if the purchase is after the levy, the lien of the execution is paramount.

But we are of the opinion that the execution had by the conduct of the plaintiff, and the delay of the officer under his direction, became dormant as against *bona fide* purchasers of Case's interest in the partnership, intermediate his death and the execution sale in March, 1868. The judgment of the plaintiff against Case was by default. In January, 1867, the plaintiff's attorney, upon the request of the attorney for Case, opened the default and allowed him to answer on payment of costs, and thereupon, in pursuance of a stipulation between the parties, directed the sheriff to suspend all further action or proceedings upon the execution until otherwise ordered. Issue was joined in the action and judgment was obtained by the plaintiff after trial in March, 1868, and then the sheriff was directed to proceed on the execution on the original judgment. From January, 1867, to this time, no step had

been taken by the sheriff on the execution. The firm of Case, Woodin & Conger continued to carry on their store as usual, selling goods and making new purchases, without interference of the sheriff. After the death of Case, the surviving partners continued the business until the settlement with the administrators, and thereafter conducted it in the name of Woodin & Conger. The delay in executing the writ was in consequence of the voluntary intervention and direction of the plaintiff. No order opening the default or staying proceedings on the execution was obtained. The plaintiff put himself in a position where he could not enforce the writ for an indefinite period, and whether it could ever be enforced was uncertain, depending on the contingency of his obtaining a second judgment in his favor. Meanwhile, the firm was allowed to go on selling the goods levied on, and dealing with the public and each other as if no execution had been issued. To hold, under these circumstances, that the execution remained in life so as to defeat the title of an intermediate *bona fide* purchaser of the property, would operate as a fraud. It is not necessary that the execution creditor should have acted in bad faith, or with an intention to defraud in delaying the execution of the writ to make it dormant as to third persons. An unreasonable delay directed by the plaintiff in the execution, although from motives of humanity, will let in and give precedence to a subsequent execution. (*Storm* v. *Woods*, 11 J. R., 110; *Benjamin* v. *Smith*, 4 Wend., 332.) And where an execution is dormant as against other creditors, it is dormant also as to *bona fide* purchasers. (*Hickock* v. *Coates*, 2 Wend., 419; *Butler* v. *Maynard*, 11 id., 552; *Ball* v. *Shell*, 21 id., 222.) We are of opinion, therefore, that the conduct and direction of the plaintiff operated as a *supersedeas* to the execution, so far as third persons are concerned (SAVAGE, Ch., J., *Hickock* v. *Coates*), and that the settlement and transfer made in October, 1867, between the defendants and the administrators of Case, is conclusive upon the plaintiff.

The referee held that the plaintiff, by his purchase on the execution sale, acquired whatever right the administrators of

Statement of case.

Case had to open the settlement for the correction of errors in the accounts, and judgment was awarded to the plaintiff for the amount of certain erroneous charges found to have been made against the estate of Case at that time. It is claimed that, proceeding upon this theory, other allowances should have been made. But there are no findings or exceptions which present this question, and we are not called upon to critically examine the voluminous evidence to ascertain whether the referee omitted any allowances which should have been made.

The conclusion reached on the principal question renders it unnecessary to consider particularly the exceptions to the admission of evidence. Much of the evidence to which objection was taken, is wholly unimportant in view of the point upon which we dispose of the case, and after examining the exceptions, we find none which require a reversal of the judgment.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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WILLIAM H. DANNAT et al., Appellants, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondents.

The system of audits and payments of accounts, provided by the act of 1873, reorganizing the government of the city of New York (chap. 335, Laws of 1873), applies to all payments from the city treasury, including payments from school moneys upon contracts of the board of education; the system provided for by the act of 1851, in relation to the common schools of said city (chap. 386, Laws of 1851), also remains in force.

To obtain payment upon such a contract, therefore, the board of education must give its draft on the city chamberlain, as prescribed in the act of 1851, which must be delivered by the payee to the finance department, as his voucher, and all the steps to final payment must be taken, as are required of other claims against the city treasury, by the act of 1873

Statement of case.

An action can only be sustained against the city after these steps have been taken, and only in case of default on its part in omitting to discharge some duty imposed upon it by statute.

(Argued June 9, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of defendants, entered upon an order dismissing plaintiffs' complaint on trial. (Reported below, 6 Hun, 88.)

The complaint in this action alleged in substance that in March, 1872, one Alonzo Dutch entered into a contract with the "school trustees of the Tenth ward of the city of New York," who were acting under the authority of the department of public instruction, by which plaintiffs agreed to do the carpenter work for a new school-house, about being erected, at a price stipulated, payable in installments. That, in April, 1873, Dutch executed and delivered to plaintiff, for lumber furnished, an order on the board of public instruction directing said board to pay plaintiff $1,350, when the next payment under the contract became due, and charge the same to account of said contract, which order was duly presented to and left with said board. That in June, 1873, the next payment became due to Dutch, under the contract, to wit., an installment of $4,000. That plaintiffs presented their claim to the comptroller of the city, and twenty days thereafter demanded of him an adjustment of their claim, but that he neglected and refused to adjust or pay the same.

Upon the trial, defendants' counsel moved to dismiss the complaint on the opening of plaintiffs' counsel, upon the ground that the city corporation was not liable for the acts of the department of public instruction, which motion was granted and plaintiffs' counsel duly excepted.

John H. Hand for the appellants. The order upon which this action was brought, and the notice to defendant of the consideration and purposes of it, operated as an equitable assignment of the fund to become payable to Dutch. (3

Kent's Com., 74; Edw. on Bills, 143; Story on Bills, § 46; *Shaver* v. *W. U. Tel. Co.*, 57 N. Y., 459; *Parker* v. *City of Syracuse*, 31 id., 376.) Being an equitable assignment, it was not necessary it should be accepted in writing; notice was sufficient. (31 N. Y., 376; *Hall* v. *City of Buffalo*, 1 Keyes, 193; *Storer* v. *Sherman*, 3 id., 620; *Field* v. *Mayor, etc.*, 2 Seld., 179; *Shuttleworth* v. *Bruce*, 7 Robt., 160.) An equitable assignment of a part of a debt is valid. (*Taylor* v. *Bates*, 5 Cow., 476; *Pattison* v. *Hall*, 9 id., 747; *Morton* v. *Naylor*, 1 Hill., 583; 2 Seld., 179.) The fact that the fund drawn upon was not due at the time is immaterial. (*Crocker* v. *Whitney*, 10 Mass., 319; *Cutts* v. *Perkins*, 12 id., 211; *Master* v. *Miller*, 4 T. R., 343.) The notice and order were delivered in due season. (Laws 1873, 196, § 2; *Campbell* v. *Sun. Ins. Co.*, 4 Bosw., 298; *Coml. Bk.* v. *Ives*, 2 Hill, 355.) Defendant is liable to plaintiffs for the full amount claimed. (*Parker* v. *City of Syracuse*, 31 N. Y., 376; *Hall* v. *City of Buffalo*, 1 Keyes, 193–199; *Lowery* v. *Steward*, 25 N. Y., 239; *Harris* v. *Clark*, 3 id., 93.)

Francis Lynde Stetson for the respondent. Defendant was not liable. (*Miller* v. *Mayor, etc.*, 3 Hun, 35; *Ham* v. *Mayor, etc.*, 5 J. & S., 458; *Schreyer* v. *Mayor, etc.*, 7 id., 1; *Terry* v. *Mayor, etc.*, 8 Bosw., 504; *Treadwell* v. *Mayor, etc.*, 1 Daly, 123; *Gildersleeve* v. *Bd. of Education*, 17 Abb., 201.) Defendant may properly disclaim any liability for a department which exists not for its benefit, but for that of the State at large. (2 Dil. on Mun. Corp., § 772; *Russell* v. *Mayor, etc.*, 2 Den., 473, 481; *Martin* v. *Mayor, etc.*, 1 Hill, 545; *Bank of Com.* v. *Mayor, etc.*, 43 N. Y., 84; *Lorillard* v. *Monroe*, 11 id., 392, 396; *Atwater* v. *Baltimore*, 31 Md., 462; *Hafford* v. *New Bedford*, 82 Mass., 297; *Fisher* v. *Boston*, 104 id. 87; *Walcott* v. *Swampscott*, 83 id., 101; *Buttrick* v. *Lowell*, id., 172; *Maxmilian* v. *Mayor, etc.*, 4 T. & C., 491.)

EARL, J. The sole question to be determined upon this appeal is whether the city of New York, can be sued directly

upon a contract made with the department of public instruction of the city, in the year 1872, for building a school-house. The money sought to be recovered in this action is alleged to be a portion of one of the installments due under the contract which has been assigned or made payable to the plaintiffs by the original contractor. The action for the present purpose must be treated as if it had been brought by the original contractor directly upon the contract to recover money due thereon.

In 1851 (chap. 386 of the Laws of that year) an act was passed "to amend, consolidate, and reduce to one act the various acts relative to the common schools of the city of New York." By that act a board of education was created, and clothed with the powers and privileges of a corporation for the purposes of the act. It was placed substantially in charge of the whole common-school system of the city. It was empowered to take and hold property, both real and personal, for the purposes of public education in the city. The money to defray the expenses of the city school system, aside from that received from the State, was to be raised by the board of supervisors of the county of New York, by taxation. But in anticipation of the taxes thus to be imposed, the common council of the city might borrow the money. The money thus raised by taxation or loan was to be placed in the city treasury. (§§ 3, 15, 16, 19, 28.) Section 16 provided how the money could be drawn from the treasury for any of the purposes contemplated by the act, and that was by the draft of the board of education, signed and drawn in the form specified upon the city chamberlain.

Under the system thus provided, there was but one way for the board of education to discharge the obligations assumed by its contracts, and that was by a draft drawn as specified in section 16 upon the city chamberlain, and so long as it was willing to give such a draft, its creditors could make no further claim upon it. If it was willing to give the draft and had done all the law required of it, it could not be sued. It could not draw the money, as the draft is required to be

made payable to the person entitled to receive the same, and hence a suit to compel it to pay would be an idle proceeding and in contravention of the statute. But if it refused to give the draft, then the creditor's remedy would be against it. If the claim was undisputed he might by *mandamus* compel the giving of the draft. If the claim was disputed he could sue the board of education in its corporate capacity, and having thus established his claim, then procure his draft. But he would have no claim against the city until he had in some way obtained such a draft as the law required. When he came with such a draft, it would be the duty of the chamberlain to pay. If he refused, having the funds in the treasury, he could be compelled by *mandamus* to pay, or could, probably, in an ordinary action, be made presumably liable for his misfeasance. So far there could be no action against the city. It had not done any thing or omitted any thing to make it liable. It could not be sued until there was some default on its part. But if the city had improperly omitted to provide the funds in the cases in which it is required by the statute to do so, and the chamberlain refused to pay the draft on that account, then the city could probably be sued, for then it would be in default.

If, therefore, the plaintiff were obliged to rest his case under the statute of 1851, he would certainly fail, because none of the conditions appear which would entitle him to an action against either the city or the board of education.

It must now be inquired whether the plaintiff's condition is bettered by any of the subsequent changes in the law. In 1870, by chapter 137 of the laws of that year, the local government of the city of New York was reorganized, and various departments of the city government were constituted, but the board of education, as previously constituted, was left untouched. By chapter 574 of the Laws of 1871, the prior act was amended so as to add another department to the government of the city called the "department of public instruction," and that department took the place of the board of education, and was clothed with the same powers and charged with the same duties. By chapter 112 of the Laws of 1873, there was

another change in the school system of the city, and the department of public instruction was abolished and a board of education again constituted, with the same powers and duties as before. During all this time the main features of the statute of 1851 remained in force, and the principal changes were in the mode of selecting the various school officers. In the year 1873 (chapter 335) the city government was again reorganized and divided into various departments, but the board of education was left substantially untouched, with its powers and duties in the main defined in the law of 1851. Under that act, as amended by chapter 757 of the Laws of the same year, additional and different provisions were made for raising the moneys needed to defray the expenses of the school system of the city. But all such moneys, when needed and raised, were, as before, to be paid into the city treasury, like all the other moneys raised for the benefit of the city. A finance department was created, at the head of which was the comptroller. In this department was an auditing bureau, which, under the supervision of the comptroller, "shall audit, revise and settle all accounts in which the city is concerned as debtor or creditor, and which shall keep an account of each claim for or against the corporation, and of the sum allowed upon each, and certify the same to the comptroller, with the reasons for the allowance; the chief officer of which shall be called auditor of accounts." In the same department was the chamberlain, whose duties are particularly defined in sections 29, 34 and 35; he was required to receive all moneys which should be paid into the city treasury, and deposit them in such banks and trust companies as should be designated by him and the mayor jointly, and no moneys could be paid out of the treasury, except upon warrants drawn by the comptroller and countersigned by the mayor; and no money could be drawn from the banks or trust companies, except by checks subscribed by the chamberlain and countersigned by the comptroller; but before any warrant could be drawn for the payment of any money, a voucher for the amount must have been examined and allowed by the auditor, approved by the

Terminer." Plaintiff was not at the time either constable or marshal. Pursuant to the appointment he attended the sessions of said court an aggregate of 250 days, for which he claimed the compensation provided by section 1, chapter 820, Laws of 1869.

Defendant's counsel moved to dismiss the complaint on the ground, among others, that plaintiff was not a constable or marshal, and therefore was disqualified to be summoned by the sheriff to attend upon said court. The motion was denied and said counsel duly excepted.

The court directed a verdict for plaintiff for the amount claimed, to which defendant's counsel duly excepted. A verdict was rendered accordingly.

D. J. Dean for the appellant. The provision of the statute requiring only marshals and constables to be summoned is mandatory, and not merely directory. (*Marchant* v. *Langworthy*, 6 Hill, 646; *People* v. *Cook*, 14 Barb., 290; 8 N. Y., 67; Potter's Dwar. on Stat., 224–227; *U. S.* v. *Cas. of Han. Penals*, 1 Paine, 406; 6 Dane's Abr., 591–593; *People* v. *Schermerhorn*, 19 Barb., 558; *Sharp* v. *Spier*, 4 Hill, 76.)

Wm. L. Findley for the respondent. Plaintiff having attended the court pursuant to the directions of the sheriff, and having performed the duties which would have devolved upon a constable, was *pro hac vice* a constable, and is entitled to the fee allowed by law for such service by a constable. (Laws 1869, chap. 820; *People ex rel. Holly* v. *Supvrs.*, 4 Cow., 146; *People ex rel. Curry* v. *Green*, 64 Barb., 504.)

ANDREWS, J. The sheriff is not entitled to a per diem compensation for attending the Oyer and Terminer or other criminal courts. This was decided in *Ex parte Minier* (2 Hill, 411). It was said in that case, that his attendance upon these courts was highly necessary, and it is clearly implied, from the duties which the statute imposes upon him in connection with them that he is to be present. But the statute

gives no specific compensation for this service. Fees are given to the sheriff for a variety of services rendered in matters growing out of the business of these courts, and as was suggested in *Ex parte Minier*, these may have been deemed sufficient compensation for his attendance. It is plain, also, that a deputy of the sheriff, who attends in place of the sheriff, can claim no compensation. His right to fees for services rendered as deputy, depends upon that of the sheriff whom he represents. When sheriff's fees are given by statute they are given to the sheriff, although the services may be rendered by a deputy.

The plaintiff, therefore, is not entitled to compensation for attending the Oyer and Terminer in his character as deputy sheriff. He was general deputy in 1871. In January of that year the sheriff appointed him a special deputy to attend the Court of Oyer and Terminer. As general deputy he could have performed the duty. Why the special appointment was made does not appear. He attended the Oyer and Terminer under this appointment, and sues to recover the per diem compensation given by statute to constables for attending courts of record, pursuant to a notice from the sheriff. (Sec. 1, chap. 820, Laws of 1869.) Section 83, volume 2, page 289 of the Revised Statutes declares, that it shall be the duty of the sheriff of each county, within a reasonable time before the sitting of any Circuit Court of Oyer and Terminer, to summon personally so many marshals, or constables of his county as he may have been directed to summon by the court or the presiding judge thereof, to appear and attend upon the said court during its sitting. If no direction shall have been given, the sheriff is to summon so many marshals and constables as he may deem necessary for the purpose. (§ 84.) The plantiff was not a constable or marshal at the time of his appointment to attend the Oyer and Terminer, or afterwards. The claim made in his behalf is that by virtue of the appointment and service he was a constable *pro hac vice*, and as such is entitled to compensation.

The difficulty with the position is, that the power of the

sheriff under the statute, is limited in the selection of attendants from two classes of existing officers, viz.: Constables and marshals, and does not authorize him to select persons who are neither constables or marshals for this service. The original statute upon the subject is chapter 27, Laws of 1819. That contained a provision that marshals or constables not summoned, "shall not be bound to attend" the sittings of the court. This was left out of the revision, probably as unnecessary, it being no part of the general duty of marshals or constables to attend courts of record, but the insertion of this provision in the original enactment shows, that the legislature then intended by the words "marshals and constables," to designate existing officers, and their intention is equally apparent we think from the statute as it now stands. Other provisions of the statute confirm this conclusion. The statute defining county charges enumerates, among others, "the compensation allowed by law to constables for attending courts of record" (1 Rev. Stat., 385, § 3), and by chapter 429 of the Laws of 1847 (reported in 1864) the sheriff was directed to summon two constables to attend the terms of the Court of Appeals and of the Supreme Court. It is quite plain that the legislature, in both of these cases, used the word "constable" in its natural and ordinary sense, and that, under the act of 1847, only persons who were constables could be summoned.

We see no ground upon which the plaintiff's claim can be sustained. His actual appointment in connection with the Oyer and Terminer was that of special deputy sheriff. His services were rendered under that appointment. He was not a constable or marshal; the sheriff could not make him one. The statute provides for compensation to such persons only who, being constables or marshals, attend the courts on the summons of the sheriff.

The case of *People* v. *Holly* (4 Cow., 146) is not an authority for the plaintiff. The claimant in that case was, as is to be inferred, both deputy sheriff and constable, and having attended the Oyer and Terminer on the summons of the

sheriff, ready to serve as constable, was held to be entitled to his fees, although he performed no duty.

The claim that there were, at the time of the plaintiff's appointment, no constables or marshals in the city of New York, within the meaning of the Revised Statutes (assuming that, if true, it would relieve the plaintiff), is not well founded. The act (chap. 484, Laws of 1862) provided that constables elected or appointed after the passage of the act should be denominated "marshals," and should have the same powers and perform the same duties as constables. Up to this time two constables were elected in each ward of the city, who possessed the common-law, and most of the statutory powers, of constables in towns. These powers were not abridged by the fact that, by the metropolitan police act of 1860, policemen were invested with similar powers, except in respect of the service of civil process. When the constables were called marshals, it was a change of name, simply, and not of function. The marshals have special duties to perform in the Marine and other inferior courts of the city, but this does not necessarily interfere with their serving as attendants upon courts of record, upon the summons of the sheriff. If the public service is likely to suffer from want of a sufficient number of this class of officers to do the duty at the courts, the remedy is with the legislature. It is sufficient to say that the present marshals answer the description of officers who may be summoned by the sheriff under the Revised Statutes. It is not difficult to see that if the construction contended for by the plaintiff is sustained, and the sheriff may summon, as attendants upon the courts, his own deputies, or persons not holding office, and thereby constitute them constables or marshals, with a claim for compensation out of the public treasury, serious abuses may result.

We think the statute is plain, and that the plaintiff must fail in his action.

Judgment reversed and new trial ordered.

All concur.

Judgment reversed.

Statement of case.

LEVI HAAS, Assignee, etc., Respondent, v. THOMAS O'BRIEN, Appellant.

An assignment for the benefit of creditors made by an insolvent debtor, in good faith, without intent to defeat the object. impair or impede the operation, or evade any of the provisions of the bankrupt act, and which transfers all his property without preferences, is not in violation of the spirit and intent of said act, and so is not void *per se*.

The fact that proceedings in bankruptcy are taken against the assignor within six months, does not affect the validity of such an assignment. The act was not intended to interfere with the action of a debtor, who, in good faith, with no fraudulent intent, voluntarily seeks to apply his property toward the payment of his debts in equal proportions, precisely as it would have been applied had proceedings been taken under the act.

Various United States District Court bankruptcy cases disapproved and distinguished.

(Argued June 12, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought by plaintiff, as assignee in bankruptcy of one Flanigan, to set aside a general assignment for the benefit of creditors, made by him, within six months prior to the commencement of bankruptcy proceedings, to defendant, and to compel defendant to account for the property received by him under said assignment.

The facts are sufficiently stated in the opinion.

Jacob A. Gross for the appellant. Plaintiff having failed to show an appointment, or to either allege or prove any transfer or assignment of the property claimed, was not entitled to the relief prayed for, and should have been nonsuited. (*Hampton* v. *Rouse*, 11 N. B. R., 472; *Schieffer* v. *Garret*, 2 id., 591; *Herndon* v. *Howard*, 4 id., 212; 40 How. Pr., 288; Bump on Bankruptcy [8th ed.], 139; id., § 5049, and notes, pp. 537, 538; id., § 5044, p. 473, and notes; id. [6th ed.], § 14; *Wells* v. *Brander*, 18 Miss., 348; *Cone* v. *Purcell*, 56

Opinion of the Court, per MILLER, J.

N. Y., 649; *Sanger* v. *Upton*, 13 Alb. L. J., No. 5, p. 81; *Sutherland* v. *Davies*, 10 N. B. R., 424; *Rogers* v. *Stevenson*, 16 Min., 68; *Cook* v. *Whipple*, 14 Am. R., 206; Bump on Bankruptcy [8th ed.], 529, § 5047, and notes.) Plaintiff having admitted that the general assignment was made in good faith, the court erred in holding it, *ipso facto*, fraudulent and void. (*Mayer* v. *Hellman*, 13 Alb. L. J., No. 12, pp. 199, 200; *Thrasher* v. *Bently*, 59 N. Y., 649; *Sedgwick* v. *Place*, 1 N. B. R. [204], 673; *Langley* v. *Perry*, 2 id. [180], 596; *Tiffany* v. *Lucas*, 8 id., 49; *Cook* v. *Rogers*, 3 Mich., 391; *Wilson* v. *City Bk.*, 17 Wal., 473, 484–485; *Browning* v. *Hart*, 6 Barb., 91, 94; *Beck* v. *Parker*, 3 Am. R. [65 Penn., 262], 625.) The general assignment was not a fraud upon the creditors or the bankrupt act. (*Langley* v. *Perry*, 2 N. B. R. [180], 597; *Tiffany* v. *Lucas*, 15 Wal., 410, 422; *Wilson* v. *Pearson*, 20 Ill., 81, 89; *Wadsworth* v. *Tyler*, 2 N. B. R., 316, 319–321; *Browning* v. *Hart*, 6 Barb., 91, 94; *Black* v. *Secor*, 1 N. B. R., 358, 359; *Buckingham* v. *McLean*, 13 How., 150, 167; *In re Craft*, 2 N. B. R., 112; Bump on Bankruptcy [6th ed.], 588; § 39, note *g*.) The motion to dismiss for want of jurisdiction should have been granted. (*Gilbert* v. *Priest*, 65 Barb., 444; *Brigham* v. *Claflin*, 7 N. B. R., 412; *Voorhees* v. *Frisbee*, 8 id., 152; *Shaw* v. *Meldrum*, 14 Abb. Pr., 165, and note; *Newman* v. *Fisher*, 37 Md., 259; *In re Wylie*, 2 N. B. R. [53], 137; *Davis* v. *Anderson*, 6 id., 146; R. S. U. S., 134, 135.)

Samuel Hand for the respondent. The assignment, having been made within six months before the filing of the petition in bankruptcy, was void. (Bump on Bankruptcy [5th ed.], 467, 510; id., 524–526; 2 B. R., 129, 131.) The State courts have jurisdiction of actions of this nature. (*Cook* v. *Whipple*, 55 N. Y., 150; *Sloan* v. *Lewis*, Alb. L. J., April 24, 1875, p. 266.)

MILLER, J. The assignment made by Flanigan to the defendant was in trust, to pay all the creditors of the assignor

equally and alike and without any preference; and it was admitted upon the trial that Flanigan, being insolvent, made and executed the assignment in good faith, and to insure, under and by virtue thereof, the distribution of all his property among his creditors without preference. It was also proved that it was made without any intention to delay, hinder or defraud creditors, or to defeat the object of the bankrupt act. The provision with which it is claimed that the assignment was in conflict and which rendered it void, declares that: "If any person, being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to the assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt; and if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud." (See § 35 Bankrupt Law, also the last two clauses § 39 Bankrupt Law, before the amendment of June, 1874.)

Although the referee found that the assignment was void under the bankruptcy act, and that it did tend to evade the provisions of the same and prevent the assignor's property from being distributed, there is no distinct finding that the assignment was made in direct contravention of the provisions cited; and the fact that it was done in good faith and without any intention to violate or defeat the provisions of the act, as already stated, rebuts any presumption, arising under the act,

that it was *prima facie* fraudulent. The conclusion of the referee referred to, therefore, rests upon the simple fact that the assignment was made within six months prior to the filing of a petition in bankruptcy within the act, in contemplation of insolvency by the bankrupt, and with the knowledge of the defendant, or reasonable cause to believe, at the time, that Flanigan was insolvent.

The real question to be determined, then, is whether an act of this kind, made in good faith, and with no fraudulent intent, for the benefit of creditors, is in violation of the spirit and intention of the bankruptcy act, and for that reason fraudulent and void. The provisions cited evidently contemplated not only that the assignor should commit the act when insolvent or in contemplation of insolvency, but that the assignee should have reasonable ground to believe that such was the case, and that the assignment was made with a view of preventing the property from being disposed of under the bankruptcy act, and as therein provided. As there is no finding of fact that the intent was to evade any of the provisions of the act, and as the proof and admissions show good faith, the conclusion that the assignment was void and did tend to evade the provisions of the act, does not appear to be warranted. The object and purpose of the act in question, was to provide a system by which the property of an insolvent could be appropriated and applied to the payment of his debts in equal and just proportions. The theory upon which the bankrupt act is based, is that no preferences shall be allowed; that every creditor shall be entitled to his *pro rata* share of the bankrupt's estate, and thus fraud prevented in the distribution of his assets. When, therefore, an assignment is made for the benefit of all the creditors equally in good faith, without fraud or any intent found to contravene any provisions of the law, or to hinder, delay or defraud creditors, it is not apparent how such assignment can be considered as a violation of the spirit and intention of the act itself.

In *Tiffany* v. *Lucas* (15 Wall., 410, 422) it was held that two things must concur to bring an assignment within the prohibi-

tion of the bankrupt act, viz.: the fraudulent design of the bankrupt and the knowledge of it on the part of the assignee. Neither of these features characterize the case at bar. The admission and proof establish that there was no such design or knowledge. In fact, that all the parties acted in entire good faith and with no intent to violate the provisions of the act. The principle is settled in this court that when the debtor has not been proceeded against, or taken any proceedings in the bankrupt court, an assignment for the benefit of creditors by such debtor, which gives no preference to any creditor, is not an instrument void *per se* as in hostility to the bankrupt act. (*Thrasher* v. *Bentley*, 59 N. Y., 649; see, also, *Cook* v. *Rogers*, 31 Mich., 391; *Beck* v. *Parker*, 65 Penn., 262; *Hawkin's Appeal*, 34 Conn., 548.) The fact that proceedings were instituted within the six months provided for by the section cited, does not change the application of the rule referred to unless there is a fraudulent design and knowledge. In *Sedgwick* v. *Place* (1 N. B. Reg., 204, 673), it was held in the United States Circuit Court of New York, by Mr. Justice NELSON, that a general assignment untainted with fraud as against creditors or the bankrupt act is valid, and the property will not be turned over to the assignee in bankruptcy. An application in this case was made for the benefit of the bankrupt act, within six months after the assignment had been made. In *Langley* v. *Perry* (2 N. B. Reg., 597), in the United States Circuit Court of Ohio, where the petition was filed against the debtor within the six months, SWAYNE, J., held, that such an assignment was not necessarily a conveyance with an intent to hinder, delay or defraud creditors, and where the intention was to secure an equal distribution of all the debtor's property among all his creditors, it was not a conveyance with an intent to defraud, or delay the operation of the bankrupt act. It was said that the innocence or guilt of the act depends upon the mind of him who did it, and it was not a fraud within the meaning of the bankrupt act unless it was meant to be so.

In *Mayer* v. *Hillman* (U. S. Sup. Ct., reported in 13 Alb.

Law Jour., 200) the general doctrine was upheld, that a general assignment for the benefit of creditors was not fraudulent or absolutely void. FIELD, J., who delivered the opinion of the court, said there was much force in the position of counsel, that such assignment is only a voluntary execution of what the bankrupt court can compel, and as it is not a proceeding in itself fraudulent as to creditors and does not give a preference to one creditor over another, that it conflicts with no positive inhibition of the statute, and that it had the support of the decisions last above cited. He further stated that it was unnecessary to express any decided opinion upon the question, because its decision was not required for the disposition of the case. Although the point now presented was not distinctly decided in the case last cited, yet that case, in connection with the other cases referred to, tends strongly to sustain the doctrine that a general assignment violates no provision of the bankrupt act. (See, also, *Smith* v. *Justiania Ins. Co.*, 4 C. L. N., 130; 12 N. B. R., 185; *In re Kintzing*, 3 N. B. R., 217.) There are authorities adverse to the cases cited; most of them are the decisions of the United States District Courts, which are not as authoritative as the cases already cited, and the distinct point now raised was not made, nor does it appear distinctly in any of them, as is the case at bar, that any of the assignments were made in good faith, and with no design to evade the provisions of the bankrupt act. (*Horter* v. *Machley*, 2 N. B. R., 406; *In re Smith*, 3 id., 377; *In re Goldschmidt*, 3 id., 164; *In re Spicer* v. *Ward*, 3 N. B., 519; *In re Randell* v. *Sutherland*, 3 B. R., 18; *Pierce* v. *Northup*, id., 250; *In re Wells*, 1 id., 171; *In re Burt*, 1 Dillon, 439; *Hardy* v. *Brannigan*, 4 N. B. R., 262.) In the last case, WOODRUFF, J., makes some remarks in regard to the design of the bankrupt act in reference to the property of insolvents, and the effect of some of its provisions, which would not apply where property was in the hands of a receiver appointed by a State court; but the point now raised was not presented, and the case is not analogous. Although some of these cases appear to sanction the doctrine,

that the bankrupt act absorbs and swallows up all other proceedings in the State courts; there are the strongest reasons for holding that the act was not intended to interfere with the debtor, where, with an honest purpose and entire good faith, he sought to apply his property for the benefit of his creditors, precisely in the same manner as was intended, and as would have been done by proceedings under the bankrupt act, and probably at less expense and far more to the advantage of the creditors. The act was aimed at fraud and to prevent preferences; and where neither of these are apparent, there is no ground for claiming that an equitable distribution of the insolvent's estate is in violation of the law. The later cases, to which reference has been had, uphold these views very decidedly, and, I think, should be followed.

The court below erred in holding that the assignment was void and tended to evade the provisions of the bankrupt act, and for this error, without considering the other questions raised, the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS VOLUME AND NOT REPORTED IN FULL.

JOHN HOGAN, Appellant, *v.* WILLIAM E. LAIMBEER, Respondent.

(Submitted April 5, 1876; decided April 18, 1876.)

DECIDED upon the facts in the case.

Davis & Lyon for the appellant.

George W. Lord for the respondent.

MILLER, J., reads for affirmance.
All concur.
Judgment affirmed.

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66 604
Case 2
77 AD 299

JOHN HIGGINS, Respondent, *v.* THE NEWTOWN AND FLUSHING RAILROAD COMPANY, Appellant.

(Argued February 23, 1876; decided April 18, 1876.)

REPORTED below, 3 Hun, 611.

The complaint in this action claimed to recover for work and labor performed at the request of defendant, in constructing an embankment and other work upon its road, which it was averred defendant agreed to pay for at specified rates. It appeared upon the trial that the work was done under a special contract, which was put in evidence by plaintiff. By the

contract defendant was to pay for the work at the contract price upon the estimates of its engineer, as certain portions were finished. Plaintiff gave evidence, showing the full completion of the contract on his part; that he had requested the executive committee of defendant's board of directors to send the engineer to measure the work, which they promised to do, but did not; also, that he requested the engineer to make the measurement, which he promised to do, but did not. Defendant's counsel moved to dismiss the complaint, on the ground that the terms of the written contract were not set forth therein, and that it did not aver that the engineer ever made any estimate, nor any performance or waiver of the condition precedent contained in the contract. The motion was denied, and defendant's counsel excepted. Upon the appeal, defendant's counsel claimed that the proof was defective in not showing any estimate or any excuse for not having obtained the same. *Held*, that it was not necessary to determine whether the proof was sufficient to dispense with the estimate, as no point was taken upon the trial presenting the same; the motion to dismiss having been founded solely upon objections to the form of the complaint; and that these were not tenable, as it was settled prior to the Code that a party who had fully performed a special contract for work and materials was not bound to declare upon the contract, but might declare generally for the value of the work, and the contract might be referred to to determine the value, which rule of pleading has not been changed by the Code. (*Farron* v. *Sherwood*, 17 N. Y., 227; *Felts* v. *Vestvali*, 2 Keyes, 152.) Various other questions were disposed of upon the facts in the case.

Elias J. Beach for the appellant.

James W. Covert for the respondent.

RAPALLO, J., reads for affirmance.
All concur.
Judgment affirmed.

The People ex rel. William M. Stevens, Respondents, *v.* William B. Hayt, Appellant.

The People ex rel. James E. Munger, Jr., Respondents, *v.* Daniel Gerow, et al., Appellants.

To entitle a party to a writ of *mandamus*, he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ is directed; also, that such person still has it in his power to perform the duty required.

So, also, whatever is required to be done by the relator as a condition precedent to the right demanded, must be shown affirmatively to have been performed by him before he is entitled to the writ.

People ex rel.* v. *Hayt **(7 Hun, 39) reversed.**

(Argued April 4, 1876; decided April 18, 1876.)

These were appeals from orders of General Term which reversed orders of Special Term denying motions in each case that a *mandamus* issue. (Reported below, 7 Hun, 39.)

By chapter 400, Laws of 1875, the town of Wappinger was created from a portion of the territory of the town of Fishkill, the residue remaining and continuing as the town of Fishkill. It was provided (§ 2) that the town officers elected in the old town, "should hold over and perform the duties of their respective offices" for both towns, until the first Tuesday of March, 1876, when elections in each town were directed.

In the matter first above entitled, the application was for a *mandamus* to compel the defendant, who was town clerk of the town of Fishkill at the time of the passage of said act, and was a resident of the territory remaining under the act in the town of Fishkill, to file a chattel mortgage given to relator, who was a resident in the new town of Wappinger, by a resident of said town, and to properly index the same as required by statute.

The second application was by relator, a resident and tax-payer of the new town, to compel defendants who were at the time of its creation assessors of the old town, two of whom were residents in the territory left to said town, and one of

whom resided in the new town as the board of assessors for the new town, to ascertain the taxable inhabitants and property thereof, and prepare an assessment roll for said town.

The Special Term denied the applications on the ground that the said act was unconstitutional and void. *Held*, that the act had no effect upon the powers, the property, rights or obligations of the town of Fishkill, or upon the terms or tenure of office of those then holding office therein, and who continued to reside in that portion of the town not set off to the new town, and that except as otherwise provided by law all the statutes then in force, relating to the town of Fishkill, were in full force and effect in said town, after the alteration of its boundaries and curtailment of its territory. (1 R. S., 338; *Hampstead* v. *Hampstead*, 1 Hop., 288; *People* v. *Garey*, 6 Cow., 642; *Ex parte McCollum*, 1 Cow., 551.) That, therefore, section 3 of said act, which continues all laws then affecting the town of Fishkill, and makes them applicable to said town as it existed under the act, which section was challenged as violative of article 3 of section 17 of the Constitution, was of no force or effect whatever, as it was not necessary to continue such laws, and it was entirely immaterial whether the section was in or out of the act; that it had become of no importance whether the officers elected for the town of Fishkill were constitutionally officers of the town of Wappinger, as an election for officers had been had under the act; that conceding that the officers of Fishkill could not be made, by the legislature, officers of Wappinger, the attempt so to do by enactment did not necessarily vitiate the entire act; that it was not for the court, unless necessary for the determination of matters before it, to hold any part of the act unconstitutional, and any omissions of duty on the part of the officers affecting the public, could not be remedied or supplied by any judgment that could be given in these proceedings.

The court laid down the following general principles as applicable to writs of *mandamus*: First, that to entitle a relator to the writ, he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ must be directed; also, that such person still has it in his

power to perform the duty required. (*People* v *Supervisors*, 12 Barb., 217; Topping on Man., 17.) Second, that whatever is required to be done by such relator as a condition precedent to the right demanded, must be shown affirmatively to have been performed by him. (Topping on Mandamus, 28; id., 251.) Also held, that the relator Munger had no right, as a resident and tax-payer, upon his own motion and in his own behalf, to take action to compel the assessors of the town to perform their duties; and, even if it should be claimed that any tax-payer had such power, the time had long gone by at the time of granting the order for *mandamus* in that case, and the writ, therefore, being unavailing, should not have been granted; that as to the application of the relator Stevens, the writ might be denied on the ground that it was not clear that defendant Hayt was bound by law to exercise the jurisdiction demanded of him; but, conceding this, it did not appear affirmatively that he had been put in default, as the act requiring chattel mortgages to be filed (Laws of 1833, chap. 279; Laws of 1849, chap. 69) gives the clerk certain fees, and a payment or tender of these fees was necessary to entitle relator to demand the filing and registry of his mortgage; no such payment or tender appears; also that the statute requires the filing to be in the town where the mortgagor, if a resident of the State, resides; defendant resided in Fishkill, had no office in Wappinger, and had undertaken no duties, nor assumed the office of town clerk of the latter town; nor does it appear that he had the means or could provide a book for registry at the expense of the town; also, the relator had no legal right to compel defendant to go from his residence to some place in Wappinger, and there perform the act required, and the filing of the mortgage in Fishkill would have been useless.

M. A. Fowler for the appellant.

Wm. I. Thorn for the respondent.

Per Curiam opinion for reversal of order of General Term, and affirmance of order of Special Term.

All concur.

Ordered accordingly.

HENRY MORTHORST, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

66 609
112 399

(Argued April 6, 1876; decided April 18, 1876.)

A. P. Laning for the appellant.

J. H. Martindale for the respondent.

All concur; ALLEN, J., not sitting.

Judgment affirmed.

ROBERT MILLER, Appellant, *v.* ANDREW COATES, Impleaded, etc., Respondent.

(Argued April 11, 1876; decided April 18, 1876.)

THE complaint in this action alleged, in substance, that the parties entered into an agreement in Scotland by which plaintiff agreed to come to the United States for the purpose of introducing into the markets of this country "Andrew Coates' best linen and shoe thread," which were manufactured by defendant. Defendant was to pay plaintiff's expenses for passage, and to pay him $2,000, for one year, for his personal expenses, to furnish him with goods, pay the expenses of the business, and, at the end of the year, defendant, if he saw fit, could abandon the enterprise, and plaintiff was to have no other claim save the $2,000. In case defendant chose to continue the business at the end of the year, plaintiff was to receive and be paid for his services the same allowance, and an additional amount to be subsequently determined and calculated upon the basis of the future increase of the business, the value of the same, and the value, success and merit of plaintiff's services, and, also, that plaintiff was to have a share in the profits. That, under such agreement, plaintiff came to New York in 1866, opened an office, and commenced business, which he succeeded in making profitable, so that at the end

of the year defendant determined to continue it. That plaintiff, by his efforts and labors, made defendant's thread the leading article in the market, and the business rapidly extended and was very profitable. That plaintiff so continued the business until 1871, when, without cause, he was discharged, and the management of the business taken from him. That at the time there remained due him of the sum of $2,000 allowed him for personal expenses the sum of $5,000, besides his claim for services under and in pursuance of said agreement; that plaintiff, needing money, for the purpose of obtaining the $5,000 which defendant conceded to be his due, but which he refused to pay unless plaintiff would execute a receipt in full, was induced to sign a receipt releasing and withdrawing all claim under said agreement. Plaintiff asked that defendant be required to account and pay to him the value of his services, his proper share of the profits, the good-will and value of the business, etc. Defendant Coates demurred that the complaint did not set forth a cause of action. The demurrer was sustained below. *Held*, error; that under the agreement plaintiff was entitled to demand at least the $5,000, together with what his services were reasonably worth in addition; that the allegation as to the giving a receipt was unnecessary, but did not show a compromise of the claim in excess of the $5,000 paid, or any attempt to adjust and settle the same; that there was no accord and satisfaction or any payment on account of said claim, but merely a payment of an acknowledged indebtedness entirely independent of said claims, and that the receipt of the $5,000 furnished no consideration for an agreement not to make any further claim. (*Ryan* v. *Ward*, 48 N. Y., 204.)

George N. Williams for the appellant.

James N. Varnum for the respondent.

Per curiam opinion for reversal of judgment of General Term and affirmance of order of Special Term.

All concur.

Judgment affirmed.

JOHN S. SLINGERLAND, Respondent *v.* ERASMUS BENNETT, Appellant.

(Argued April 11, 1876; decided April 18, 1876.)

THIS was an action for fraud. Defendant purchased of plaintiff a pair of horses, turning out in part payment a promissory note. The fraud alleged was fraudulent representations as to the responsibility of the maker of the note. Plaintiff sued the note and obtained judgment, but could not collect. The court charged, among other things, in substance, that if the jury believed the alleged fraud established, plaintiff, in addition to the amount of the note, was entitled to recover the costs in the action against the maker, with interest, to which defendant's counsel duly excepted. *Held*, error; that plaintiff was not obliged to sue the note as a condition precedent to his right to recover; the costs were not the proximate result or the natural consequence of the fraud; and therefore were not a proper item of damages.

J. H. Clute for the appellant.

Amasa J. Parker for the respondent.

Per Curiam opinion for reversal and new trial, unless plaintiff stipulates to deduct from the recovery the sum of ninety-three dollars and thirty-six cents, and if he so stipulates, the judgment, as so modified, affirmed.

All concur.

Judgment accordingly

LUCIUS E. GREEN et al., Respondents, *v.* PERRY M. ELDRED, Appellant.

(Argued April 10, 1876; decided April 25, 1876.)

THIS was an action of ejectment. The sole question was as to the construction of an exception in a deed under which plaintiff claimed, *i. e.*, whether the premises in question were

included in the exception and so excluded from the grant. The deed was construed in view of the surrounding circumstances.

Martin I. Townsend for the appellant.

Esek Cowen for the respondents.

ANDREWS, J., reads for affirmance.
All concur.
Judgment affirmed.

LEAH J. INGERSOLL, Administratrix, etc., Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued April 10, 1876; decided April 25, 1876.)

S. W. Jackson for the appellant.

W. L. Van Denburgh for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

NORMAN COX et al., Administrators, etc., Appellants, *v.* WARREN S. WIGHTMAN, Executor, etc., et al., Respondents.

(Argued April 12, 1876; decided April 25, 1876.)

REPORTED below, 4 Hun, 799.

E. H. Prindle for the appellants.

Wm. F. Jenks for the respondents.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

THE WASHOE TOOL MANUFACTURING COMPANY, Respondent, *v.* THE HIBERNIA FIRE INSURANCE COMPANY OF OHIO, Appellant.

An action upon a policy of fire insurance was commenced in the name of L., as assignee. Subsequently, upon affidavits that it had been reassigned, the insured was substituted as plaintiff; defendant acquiesced in the order by receiving costs allowed to it. On the trial defendant objected to a recovery, without proof of an assignment and reassignment. The objection was overruled, and a motion was granted, without objection, conforming the complaint to the proof. *Held*, that the objection was untenable, as after the granting of the motion to conform there was nothing in the pleadings or proofs to show an assignment.

The policy contained a clause that the company would not be liable, unless premiums "be actually paid to the company." It was delivered by defendant's agent, without requiring prepayment. Payment of the premiums was demanded several times, but not paid. Plaintiff's officer, at the time of the last demand, promised to pay in a few days. The policy was not canceled, nor was plaintiff notified that it would be void, unless payment was made. *Held*, that the evidence justified a finding that the waiver of payment continued up to the loss, and that defendant was liable.

(Argued April 12, 1876; decided April 25, 1876.)

THIS was an action upon a policy of fire insurance, issued by defendant to plaintiff. (Reported below, 7 Hun, 74.)

The action was originally brought in the name of one Lathrop, who sued as assignee. An order was subsequently made substituting the present plaintiff, upon affidavits showing that the claim had been reassigned. Upon the trial defendant's counsel objected to a recovery without proof of the assignment and reassignment; the objection was overruled. No proof thereof was given, and at the close of the evidence, after proof of the issuing of the policy and of loss, a motion was made and granted, without objection, conforming the pleadings to the proof. *Held*, that the objection was untenable; that, after the granting the motion to conform, there was nothing showing an assignment, either in the complaint or proofs; that the original complaint could not be used to show an assignment without being offered in evidence.

It was objected that it not appearing that the original plaintiff ever had a cause of action, the present plaintiff could not

have been properly substituted. The order to substitute was acquiesced in, defendant receiving costs allowed by it. *Held*, that it could not now object that the order was not properly made.

The policy contained a clause declaring that the company would not be liable until premiums should be actually paid. The policy was delivered by defendant's agent, who waived prepayment, and no time was fixed for payment. Payment was demanded of plaintiff several times, but not made at the time of the last demand. Plaintiff's officer, of whom demand was made, said he would pay it in a few days. The policy was canceled, nor was plaintiff notified that it would be void or canceled, unless payment was made. *Held*, as above.

N. C. Mook for the appellant.

S. A. Noyes for the respondent.

EARL, J., reads for affirmance.
All concur.
Judgment affirmed.

HOWARD ALLISON, Receiver, etc., Respondent, *v.* WILLIAM E. WELLER, Appellant.

THE SAME, Respondent, *v.* THERON WELLER, Impleaded, etc., Appellant.

(Argued April 14, 1876; decided April 25, 1876.)

THE first case reported below, 8 Hun, 608.

Gilbert C. Hulse for the appellants.

D. D. McKoon for the respondent.

Agree to affirm. No opinion.
All concur.
Judgments affirmed.

JAMES SLATER, Respondent, *v.* SAMUEL EMPERSON, Appellant.

(Submitted April 14, 1876; decided April 25, 1876)

THIS action was upon a promissory note.

Plaintiff had contracted to repair a house for defendant; he rendered a bill for $2,074.91, of which $1,670 purported to be for a balance due on the contract, and $404.91 for extra work. Defendant paid $175 in cash; gave two notes, one for $850, which he paid, and the note in suit for $1,000. Plaintiff understood that the cash and notes, which amounted to $2,025, were in full settlement, and that defendant, upon his deducting the forty-nine dollars and ninety-one cents from the bill, accepted the work as completed. Defendant testified that the bill was settled at $2,025, but that it was agreed that if, on examination, it should be found that any of the work called for by the contracts was not completed, plaintiff was to complete it. The referee found that the parties misunderstood each other; that no settlement was in fact mutually agreed upon; that of the work, a portion to the amount of ninety-two dollars and thirty-eight cents was not done, and that defendant was entitled to a deduction of that amount from the amount of the bill. The principal point argued on appeal was upon defendant's claim that the deduction should have been made from the note; in other words, that plaintiff should deduct the forty-nine dollars and ninety cents allowed on the alleged settlement, and the ninety-two dollars and thirty-eight cents for the deficiency. *Held*, not tenable; that no settlement having been, in fact, made, all that plaintiff was required to do, was to make good the deficiency.

T. G. Swartwout for the appellant.

L. T. Yale for the respondent.

RAPALLO, J., reads for affirmance.
All concur.
Judgment affirmed.

SAMUEL JONES, Appellant, *v.* CARLISLE NORWOOD, Respondent.

(Argued April 14, 1876; Decided April 25, 1876.)

Hamilton Odell for the appellant.

Carlisle Norwood, Jr., for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

BAILEY HASCALL, Respondent, *v.* THE LIFE ASSOCIATION OF AMERICA, Appellant.

(Argued April 17, 1876; decided April 25, 1876.)

REPORTED below, 5 Hun, 151.

Carlisle Norwood, Jr., for the appellant.

John E. Parsons for the respondent.

Agree to affirm on opinion of court below.
All concur.
Judgment affirmed.

GEORGE B. BROWNELL, Executor, etc., Appellant, *v.* EDWARD AKIN, Respondent.

(Argued April 18, 1876; decided April 28, 1876.)

REPORTED below, 6 Hun, 378.

James Lansing for the appellant.

Esek Cowen for the respondent

Agree to dismiss appeal. No opinion.
All concur.
Appeal dismissed.

PATRICK MCGRILL, Respondent, *v.* THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

(Submitted April 19, 1876; decided April 28, 1876.)

Laning & Willett for the appellant.

Lewis & Gurney for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

THE TRADESMAN'S NATIONAL BANK OF THE CITY OF NEW YORK, Respondent, *v.* BERNARD MCFEELEY et al., Executors, etc., Appellants.

(Argued April 25, 1876; decided April 28, 1876.)

Isaac Dayton for the appellants.

Robert H. Corbett for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

IN THE MATTER OF THE PETITION OF LUCINDA S. MORGAN et al., Trustees, etc., Respondents; FOR THE REMOVAL OF WILLIAM R. MORGAN, Appellant.

THE SAME, Appellant, *v.* THE SAME, Respondents.

THE SAME, Appellant, *v.* THE SAME, Respondents.

(Argued April 20, 1876; decided April 28, 1876.)

John A. Godfrey for the appellant.

Joseph H. Choate for the respondents.

Agree to affirm. No opinion.
All concur.
Order affirmed.

WILLIAM B. DINSMORE et al., Appellants and Respondents, *v.* ALVIN ADAMS et al., Respondents and Appellants.

Where a motion to vacate a judgment taken by default is made both on the ground of mistake, inadvertence, surprise or excusable neglect, and also on the ground of fraud, and the facts warrant the granting of the motion on that ground, it will be presumed, on appeal from an order of General Term, affirming an order granting the motion, as against an objection, that the order was granted more than a year after notice of judgment, and so was improper under section 174 of the Code; that the order was granted on the ground of fraud, and the limitation of said section does not apply.

Such an order is not reviewable here.

(Argued April 25, 1876; decided April 28, 1876.)

THESE were cross appeals. Plaintiffs appealed from an order of General Term affirming an order of Special Term vacating and setting aside the judgment herein as against thirty-five of the defendants. Defendant Daniel Phillips and fifteen others appealed from an order denying the motion as to them. (Reported below, 5 Hun, 149.)

The motion was made on the ground of inadvertence and excusable neglect, and also on the ground of fraud. The court held, as to defendants' appeal, that the motion was addressed to the discretion of the court and was not appealable, citing *Foote* v. *Lathrop* (41 N. Y., 358), *Schdettler* v. *Gardiner* (47 id., 404), *Depew* v. *Dewey* (56 id., 657), *White* v. *Coulter* (59 id., 629), *Miller* v. *Tyler* (58 id., 480).

As to plaintiff's appeal, it was urged that the motion should not have been granted as the time limited by the Code (§ 174) for making such a motion had expired. *Held*, as above.

W. W. MacFarland for the defendants, appellants.

John E. Burrill for the plaintiffs.

Per Curiam memorandum for dismissal of appeal.
All concur.
Appeal dismissed.

HENRY S. CAMBLOS, Respondent, *v.* FREDERICK BUTTERFIELD, Impleaded, etc., Appellant.

(Argued April 25, 1876; decided April 28, 1876.)

Andrew Boardman for the appellant.

John E. Burrill for the respondent.

Agree to dismiss appeal. No opinion.
All concur.
Appeal dismissed.

FREDERIC W. HOTCHKISS *v.* JOHN H. PLATT, Assignee, etc., Appellant, JOHN Q. CLARK et al., Sureties, Respondents.

(Argued April 26, 1876; decided April 28, 1876.

Austin G. Fox for the appellant.

Thos. B. Hubbard for the respondents.

Agree to affirm order. No ovinion.
All concur.
Order affirmed.

THE PEOPLE ex rel. DANIEL T. WHITE, Respondents, *v.* ROBERT BURROUGHS, Supervisor, etc., Appellant.

(Argued April 25, 1876; decided April 28, 1876,)

J. W. Covert for the appellant.

B. R. Prince for the respondents.

Agree to affirm. No opinion.
All concur.
Order affirmed.

DANIEL H. FRAWLEY, Respondent, *v.* THE FLUSHING, NORTH SHORE AND CENTRAL RAILROAD COMPANY, Appellant.

(Argued April 26, 1876; decided April 28, 1876.

E. B. Hinsdale for the appellant.

Samuel Hand for the respondent.

Agree to affirm. No opinion.
All concur.
Order affirmed.

CHARLES WATSON, Respondent, *v.* MATTHEW T. BRENNAN, Sheriff, etc., Appellant.

In an action against a sheriff for falsely returning an execution *nulla bona*, the burden is upon plaintiff to show that there was property upon which defendant, by the exercise of proper diligence, could have levied, not upon defendant to show that he could find none.

(Argued April 20, 1876; decided April 28, 1876.)

THIS was an action against defendant, as sheriff of the county of New York, for making a false return of *nulla bona* to an execution.

In November, 1870, James O'Brien, then sheriff of said county, seized the stock of goods of E. P. Sanger & Co., by virtue of an attachment for $3,000. O'Brien's term of office expired and defendant became sheriff on January 1, 1871. On the twelfth of that month, he received the executions against Sanger & Co., amounting to nearly $10,000. On the same day, his deputy went to the store to make a levy but found it in possession of O'Brien's deputy, who would not let defendant's deputy into the store, or allow him to take possession or make an inventory; he claimed to have made an informal levy by announcing that he levied on the surplus, subject to the attachments. On the fourteenth January, O'Brien's deputy removed a portion of the goods; of this neither defendant nor his deputy had any notice at the time, and, when advised of it, endeavored to find where the goods were, inquiring of O'Brien's deputy, the judgment debtors and others, but could not ascertain, and it did not appear that defendant or his deputy learned where they were until the execution had run out. On the fifteenth January, defendant's deputy put a person outside the store to watch. On the 1st February, 1871, plaintiff recovered a judgment against Sanger & Co. for about $500, and issued an execution to defendant. A similar informal levy was made, subject to the attachment and the prior executions. O'Brien's deputy remained in possession of the store, excluding defendant's deputy therefrom, until February twenty-fourth, when a

petition in bankruptcy was filed against Sanger & Co., and an injunction was issued restraining defendant from selling under the executions. On March eleventh, Sanger & Co. were declared bankrupts, and assignees appointed; the injunction was so far modified as to allow defendant to sell under his executions and hold the proceeds. On such sale, all the property in the store fell short of satisfying the two executions prior to plaintiff's. The goods removed by O'Brien's deputy were retained by him until the adjudication in bankruptcy, when they were delivered to the United States marshal by whom they were sold for about $5,000. *Held*, that defendant was justified in returning plaintiff's execution *nulla bona*; that as to the goods left in the store, the former executions had the priority, and the goods being insufficient to satisfy them, plaintiff could not complain; that plaintiff could not complain of the removal of the goods, as defendant did not then have his execution, and due effort and inquiry having been made to ascertain their whereabouts, he was not liable; also, that defendant was not bound to assume that the attachment was illegal. The court also reaffirmed the doctrine above stated.

A. J. Vanderpoel for the appellant.

S. B. Brownell for the respondent.

Earl, J., reads for reversal and new trial.
All concur.
Judgment reversed.

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66 622
109 589

66 622
124 515

J. Watts De Peyster, Respondent, *v.* John Murphy, Appellant.

In pursuance of a contract made November 5, 1870, plaintiff, deeded to defendant certain premises in the city of New York, December 5, 1870, with a covenant that they were free from all *charges*, assessments and incumbrances. An assessment against plaintiff upon the premises for a street improvement, was confirmed by the board of revision and cor-

rection of assessments, November 7, 1870, but the title of the assessment was not entered in the title-book of assessments, in the bureau of arrears, until December twenty-fourth. In an action to recover the assessment, *held* (RAPALLO, J., dissenting), that the provisions of the acts relating to the collection of arrears of assessments, etc., in the city of New York (§ 6, chap. 579, Laws of 1858; § 1, chap. 381, Laws of 1871), declaring that no assessment shall be deemed to be confirmed so as to be a lien on property included in it, until the title shall be entered in said title-book as prescribed, did not affect plaintiff's liability under the covenant; that the assessment was fairly embraced in its terms; and that plaintiff was bound to pay the same.

Dowdney v. *The Mayor* (54 N. Y., 186) distinguished.

(Argued April 14, 1876; decided May 23, 1876.)

THIS action was brought to recover the amount of an assessment for a street improvement, paid by plaintiff upon premises deeded by plaintiff, in New York city, to defendant.

On the 3d November, 1870, plaintiff contracted to convey to defendant certain premises in the city of New York free of all incumbrances by warranty deed, with usual full covenants. The deed was delivered on the day specified; it contained a covenant that the premises "are free, clear, discharged and unincumbered of and from all former and other grants, titles, *charges*, estates, judgments, taxes, assessments, and incumbrances of what nature and kind soever," except as specified. It appeared subsequently that there was an assessment upon the premises for a street improvement, entered against plaintiff in the assessment list. The work for which the assessment was imposed was completed prior to May, 1870, and the assessment was confirmed by the board of revision and correction of assessments, November 7, 1870. The title of the assessment was not entered in the book of assessments in the bureau of arrears until December 24, 1870; plaintiff claimed that it did not, until that date, become a lien or charge within the covenant. Plaintiff paid the assessment under an agreement between the parties that plaintiff should pay, but that such payment should not affect the question of his liability, which liability might be legally determined, and if so determined, that plaintiff was not liable, that defendant would refund the amount with interest. This action was brought to

determine the question. It was claimed by plaintiff that under the provisions of the acts relating to the collection of arrears of assessments, etc., in the city of New York (§ 6 chap. 579, Laws of 1855; § 1, chap. 381, Laws of 1871), declaring that no assessment shall be deemed to be confirmed so as to be a lien on property included in it until the title of the assessment shall be entered in the title-book of assessments as prescribed by said statutes, the assessment was not a lien and so not within the covenant. *Held* (RAPALLO, J., dissenting), as above stated.

John E. Parsons for the appellant.

Charles E. Crowell for the respondent.

MILLER, J., reads for reversal and new trial; EARL, J., concurs; CHURCH, Ch. J., and ANDREWS, J., concur in result; ALLEN, J., does not vote; RAPALLO, J., dissents.

Judgment reversed.

MERAB B. WELCH, Respondent, *v.* JEROME ROWE, Appellant.

(Argued April 13, 1876; decided May 23, 1876.)

Jerome Rowe for the appellant.

Marcus Lyon for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

HENRY R. WINTHROP et al., Appellants, *v.* HARRIET McKIM et al., Respondents.

Winthrop v. *McKinn* (6 Hun, 59) reversed.

(Argued March 30, 1876; decided May 30, 1876.)

REPORTED below, 6 Hun, 59.

Edgar S. Van Winkle for the appellants

S. P. Nash for the respondent.

Agree to reverse judgment of General Term and affirm judgment of Special Term.

No opinion.

EARL and MILLER, JJ., dissenting.

Judgment reversed and judgment accordingly.

THE KINGSTON BANK, Appellant, *v.* ROELIFF ELTINGE, President, etc., Respondent.

66 695
116 652
B 625
123 536
B 625
125 639

(Argued April 24, 1876; decided May 23, 1876.)

THIS was an action brought to recover back moneys alleged to have been paid by mistake.

The claim of the plaintiff, in substance, was that in January, 1854, the Huguenot Bank, of which defendant was president, recovered judgment against Nicholas Elmendorf and others, to the amount of $6,351.98, and issued executions thereon to the sheriff of Ulster county. In March, 1854, plaintiff recovered judgments against said Elmendorf and others to the amount of over $15,000, and issued executions thereon to said sheriff. Some time in May, 1854, after the first executions had run out, but while plaintiff's were still in life, the sheriff levied upon a steamboat belonging to Elmendorf and subsequently sold it. Plaintiff and defendant's bank supposing the levy to have been made during the life of the

latter's execution, agreed that the sheriff might take the notes of one Van Vechten, who bid off the steamboat, for the amount of his bid; subsequently, Van Vechten made payment on the notes, which were, with plaintiff's assent, and under said mistaken belief, paid over to defendant. This was substantially the aspect of the case as it appeared upon a former trial, where a judgment was rendered for defendant which was reversed by this court. (See 40 N. Y., 391.) The court there found that the moneys paid to defendant's bank were the proceeds of the sale of the steamboat. The referee, however, before whom the second trial was had, did not find that the moneys paid to the Huguenot Bank were the proceeds of the sale of the steamer, but on the contrary that its judgments were paid direct to its attorney by Van Vechten, partly out of funds belonging to Elmendorf and the balance by his own note, nothing being said about the bid or the notes given therefor, and the same not having been presented; that Van Vechten, on such payment, demanded satisfaction of the judgments. He also found that none of the funds used to pay the executions belonged to plaintiff. The court here *held*, that the evidence was sufficient to sustain the findings, and that, even if the payment was made to defendant's bank under a mistake of fact in regard to the executions, the moneys paid could not be recovered back by the plaintiff, as neither plaintiff nor the sheriff ever had possession or title thereto. It also appeared, and the referee found in substance, that Elmendorf was the owner of real estate in Ulster county, upon which the Huguenot Bank judgments were prior liens, and which subsequent to their satisfaction was sold upon plaintiff's and other executions, and that plaintiff received upon its executions, out of the proceeds of such sale, an amount, at least, as much as was paid to and received by the Huguenot Bank, as aforesaid, and which, if its executions had remained in the hands of the sheriff and had not been returned satisfied, it would have been entitled to thereon. *Held*, that as the action was an equitable one, presenting the question as to which party the money *ex æquo et bono* belonged (*Buel* v. *Boughton*, 2 Den., 91, 93; *Barber* v. *Cary*, 11 Barb., 551, 552; *Butler* v. *Wright*, 6 Wend., 284; *Eddy* v. *Smith*, 13 id., 488, 490; *Price* v. *Neal*

3 Bur., 1354), and as the plaintiff was not entitled to recover unless it was against conscience for defendant to retain the money, and as defendant received no more than his due and thereupon relinquished a lien from which plaintiff derived full as much benefit as if it had itself received the money, plaintiff, or this ground alone, was not entitled to recover.

Also, *held*, that it was not necessary to set up and prove these facts as a counter-claim; that they were admissible as showing that the equities were with the defendant.

Samuel Hand for the appellant.

Francis Kernan for the respondent.

MILLER, J., reads for affirmance.
All concur.
Judgment affirmed.

MARY ANN HAYWARD, Respondent, *v.* MATTHW T. BRENNAN, Sheriff, etc., Appellant.

(Argued April 14, 1876: decided May 30, 1876,)

Edward Patterson for the appellant.

Edwin M. Felt for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

JOSEPH BELL, Respondent, *v.* HENRY HARRISON, Appellant.

(Submitted April 28, 1876; decided May 30, 1876.)

THE judgment in this case was reversed for error in receiving evidence of the acts and declarations of a third person whom the court held not to be the agent of defendant or authorized to speak for him.

Britton, Ely & Snell for the appellant.

A. H. & W. E. Osborne for the respondent.

ALLEN, J., reads for reversal and new trial.
All concur.
Judgment reversed.

JAMES T. RYAN et al., Appellants, *v.* THE ATLANTIC MUTUAL INSURANCE COMPANY, Respondent.

(Argued May 23, 1876; decided May 30, 1876.)

Charles E. Whitehead for the appellant.

Samuel Hand for the respondent.

Agree to affirm on opinion of court below.
All concur; MILLER, J., not sitting.
Judgment affirmed.

RUTH M. GLADDEN, Respondent, *v.* EMERSON GOODRICH, Appellant.

(Submitted May 23, 1876; decided May 30, 1876.)

Cook & Lockwood for the appellant.

Bootey & Fowler for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

WILLIAM H. JENKS et al., Respondents, *v.* CATHARINE BROWN, Appellant.

(Argued May 23, 1876; decided May 30, 1876.)

THIS was an action to foreclose a mechanic's lien for materials furnished one Phillips and used by him in work under a contract with defendant for altering and repairing a house upon her premises. By the contract the price agreed upon for the work was to be paid in five installments. It appeared that Phillips continued work after the second installment was paid. By written agreement dated January 1, 1874, the contract was canceled. It did not appear that at that time Phillips was in default. By the agreement of cancellation, Phillips was to have, for the work done, the amount of the first three installments, defendant to pay them the amount of the third. After plaintiffs furnished the materials, Phillips gave them an order on defendant, dated November 13, 1873, for $125, payable out of the third installment, which order defendant accepted. Plaintiffs filed their lien January 5, 1874, and served notice on defendant the next day. Plaintiffs proved declarations of defendant tending to show that the instrument of cancellation was not, in fact, executed until after notice was served. It did not appear that defendant had ever paid to Phillips the amount agreed upon as due to him. At the close of the evidence, defendant's counsel moved to dismiss the complaint on the ground that the order never became due, as the contract was not carried out, which motion was granted. *Held*, error; that it was to be presumed Phillips had earned the third installment, and so the order that became due, although the whole contract was not completed; that defendant cannot complain of the non-performance as the contract was canceled by mutual consent, and, so far as appears, without any default; that the date of the cancellation agreement was not conclusive as to the time of its execution, and the other evidence tending to show it was executed after the lien had attached. Such lien could not be affected by any subsequent arrangement between the owner and contractor.

Samuel Hand for the appellant.

J. Albert Wilson for the respondents.

EARL, J., reads for affirmance.
All concur.
Order affirmed and judgment absolute against defendant.

GATES SHERWOOD et al., Respondents, *v.* THE MERCANTILE MUTUAL INSURANCE COMPANY, Appellant.

Where, by the terms of a policy of insurance on the cargo of a canal boat, if in consequence of ice or the closing of navigation the voyage cannot be finished the same season, the risk is to terminate at the time the voyage shall be stopped, three days being given to discharge the cargo, the insured has the right to make every effort to continue the voyage, notwithstanding it be apparent that it cannot be completed by reason of ice; the actual stoppage, is the time from which the three days for discharging are to be computed, and mere delays, coupled with the impossibility of completing the entire voyage, do not show actual stoppage; the voyage can only be stopped by act of the master or causes making further progress impossible. The insured has also the right, although there are obstructions by ice, to continue the voyage to a proper place to discharge the cargo and lay up the boat for winter.

(Argued May 23, 1876; decided May 30, 1876.)

THIS was an action upon a policy of insurance on the cargo of a canal boat, for a voyage on the Erie canal from Albion to Albany.

The policy contained this clause: "It is understood, that if in consequence of ice or the closing of navigation, the said voyage cannot be finished the same season, the risk to end at the place and at the time the voyage is stopped, three days being given to discharge."

The boat reached the village of Durhamville on the twenty-eighth or thirtieth of November, and went on to a dry dock the next day for repairs. She was taken off at night and laid by the dock, as she was a day boat. At that time there was no ice in the canal, but ice formed during the night. The boat

leaked some and was not moved until December third, when plaintiff's evidence tended to show, the master of the boat attempted to move her down to a warehouse, some sixty rods below, to unload, if the voyage could not be continued. Men were employed to break the ice, a passage was broken through and the boat started but sank on the way. There was some conflict of evidence upon this and other points. At the close of the evidence the defendant's counsel requested the court to direct a verdict for the defendant upon the ground, among others, that the risk had terminated at the time the loss occurred. The motion was granted and plaintiff's counsel duly excepted.

Held, error; that whether the voyage was actually stopped before the boat had reached the place where she sank, was a question of fact for the jury; that the inability to finish the entire voyage and the actual stoppage for cause were distinct, the court laying down the doctrine above stated.

Geo. B. Hubbard for the appellant.

John H. White for the respondents.

ALLEN, J., reads for affirmance of order granting a new trial, and for judgment absolute against defendant.

All concur.

Order reversed and judgment accordingly

ANNA K. GILMAN, Executrix, etc., Appellant, *v.* THEOPHILUS GILMAN, Respondent.

(Argued May 23, 1876; decided May 30, 1876.)

THIS was an appeal from an order of General Term affirming an order of the surrogate of the county of New York directing the payment to respondent of a legacy left to him by the will of his father, Nathaniel Gilman, out of a fund on deposit in the Union Trust Company. (Reported below, 4 Hun, 68.)

It appeared that decrees for payments of large sums to legatees and others had been made, and some not properly

chargeable upon the fund deposited had been paid therefrom, and no accounting had been had by the executors. It was claimed by appellant that respondent's legacy had been paid. *Held*, that an accounting should be had and the rights of legatees and distributees adjudged before the assets of the estate were further encroached upon; and that defendant had failed to establish a legal right to be paid the legacy in full from the fund charged; also, that as important questions of fact were put at issue, by the conflicting statements of the petition and opposing affidavits, it was the duty of the surrogate to ascertain the truth by evidence *aliunde*.

Wellesley W. Gage for the appellant.

Chas. E. Whitehead for the respondent.

ALLEN, J., reads for reversal of order of Supreme Court, and of decree of surrogate and proceeedings instituted, with directions to the surrogate to proceed in accordance with views expressed in opinion.

All concur.

Ordered accordingly.

ALEXANDER MCGUIRE, Respondent, *v.* TRUE W. ROLLINS, Appellant.

(Argued May 23, 1876; decided May 30, 1876.

John J. Perry for the appellant.

Samuel Hand for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

66 633
116 65
116 66

JOEL W. MASON et al., Respondents, *v.* CHARLES PARTRIDGE, Impleaded, etc., Appellant.

LEVY KILBURN et al., Respondents, *v.* THE SAME, Appellant.

EDWIN SAWYER et al., Respondents, *v.* THE SAME, Appellant.

(Argued May 24, 1876; decided June 6, 1876.)

THESE were actions against defendants, as partners, to recover for goods alleged to have been sold to the firm.

It appeared that defendants, Partridge and Whitney, entered into a written agreement by which the former agreed to furnish to the latter $2,000, to be used in the business of buying and selling chairs. Whitney was to conduct the business, to pay cash only, and Partridge was not to be liable beyond the $2,000, each to have one-half the profits. Partridge furnished the money as agreed. Whitney subsequently purchased of plaintiffs large amounts of goods for the business on credit. Plaintiffs knew the terms of the agreement. The referee found, upon what the court deemed sufficient evidence, that the limitations of the contract were thus disregarded with Partridge's knowledge. *Held*, that the agreement made Partridge a partner, and the limitations having been disregarded with his knowledge, they furnished no defence, and he was liable.

Wheeler H. Peckham for the appellant.

Joseph H. Choate for the respondents.

Per Curiam opinion for affirmance.
All concur.
Judgments affirmed.

DAVID S. WHINTRINGHAM, Appellant, *v.* WILLIAM A. DIBBLE, Assignee, etc., Respondent.

Upon an issue as to whether an assignee for the benefit of creditors has paid a preferred creditor, evidence tending to show that the assignee has not paid another preferred creditor in the same class is incompetent.

(Argued May 29, 1876 ; decided June 6, 1876.)

THIS action was brought by plaintiff, as creditor of the firm of Acker & Harris, against defendant as assignee to recover the amount of his debt.

Said firm, having failed, made an assignment to defendant for the benefit of creditors. The assignment made preferences, and plaintiff was in the first class of preferred creditors. Defendant alleged that he had paid plaintiff's claim, and the only issue was as to payment. Defendant testified, on the trial, that he paid the first class in full. He was asked as to one Demorest, a creditor in that class, and he testified that he paid Demorest's claim to some one who had purchased it, or who represented him. Demorest was subsequently called as a witness by plaintiff, and was asked: "Did you ever receive from him (defendant) any amount whatever, and if so, what amount?" This was objected to and the objection sustained. *Held*, no error; that evidence tending to show that he had not paid Demorest had no bearing upon the issue, and the evidence was not competent as discrediting defendant, as he had not testified that he paid any thing directly to Demorest.

Defendant testified that he paid the first class in full, and paid a dividend upon the second class. He was then asked, on cross-examination, what dividend he made on the second class. This was objected to, and objection sustained. *Held*, no error; that the evidence was wholly immaterial.

C. Bainbridge Smith for the appellant.

James M. Smith for the respondent.

Per Curiam opinion for affirmance.
All concur.
Judgment affirmed.

FRANK L. STOWELL, Respondent, *v.* GEORGE T. HAZELETT et al., Appellants.

(Submitted May 29, 1876; decided June 6, 1876.)

THIS was an action brought by plaintiff as judgment creditor of defendant Hazelett to set aside a mortgage executed by him to defendant McIntosh as in fraud of creditors. The principal questions presented were upon the evidence, the court holding that it was sufficient to sustain the judgment. Plaintiff's counsel offered, and was permitted to prove under objection and exception, declarations of Hazelett made before the execution of the mortgage, said counsel stating that he claimed the testimony only as evidence against Hazelett. *Held*, no error; that it was to be inferred that the referee only received and considered it with that limit.

Plaintiff's counsel offered in evidence the testimony of Hazelett, given on a former trial. This was objected to by counsel acting for both defendants generally. No specific objection to the receipt of the evidence as against McIntosh was taken. The objection was overruled. *Held*, no error; that the evidence was proper as against Hazelett, and the referee was right, therefore, in overruling an objection which sought to exclude it entirely.

George T. Spencer for the appellants.

D. H. Bolles for the respondent.

FOLGER, J., reads for affirmance.
All concur.
Judgment affirmed.

JOHN A. GRAY, Appellant, *v.* SAMUEL W. GREEN et al., Respondents.

(Argued May 30, 1876; decided June 6, 1876.)

Clarkson N. Potter for the appellant.

Edward N. Dickerson for the respondents.

Agree to dismiss appeal. No opinion.
All concur.
Appeal dismissed.

CHRISTOPHER B. KEOGH et al., Appellants, *v.* WARREN W. WESTERVELT et al., Respondents.

(Argued May 29, 1876; decided June 13, 1876.)

THIS was an action to foreclose a mechanic's lien on lands formerly owned by defendant Westervelt, but before the filing of the lien sold and conveyed to defendant Donovan. Plaintiff delivered to Donovan a written list of "sashes, doors and blinds for four houses," with a proposition at the foot as follows: "We will supply sashes, doors and blinds, as per list, for the amount net cash, as per agreement, two thousand dollars ($2,000) on delivery of the goods," which proposition was accepted by Donovan, and plaintiffs entered upon the performance of the contract. After delivery of a portion of the goods they demanded payment therefor, and refused to deliver any more until paid for what had been delivered. The defence was, that plaintiffs were not entitled to any payment until entire performance on their part. The referee found that the contract was in writing to deliver the goods for the price of $2,000, and that delivery was a condition precedent to payment; that having failed to perform, they could not recover. There was parol evidence tending to show that it was agreed between the parties that the goods should be paid for as fast as delivered, and

that the words, "as per agreement," and the written proposition had reference to such parol agreement. No separate price was put upon any article named in the list. Plaintiffs simply excepted to the finding of the referee that the contract was in writing. *Held* (MILLER, RAPALLO and ANDREWS, JJ., dissenting), that the case contained no exception which would enable plaintiffs to avail themselves of the parol agreement claimed, as they did not request the referee to find such agreement, nor did they except to the finding that the agreement was as claimed by defendants; that the exception to the finding that the agreement was in writing did not reach the question.

William Q. Judge for the appellants.

W. McDermott for the respondents.

EARL, J., reads for affirmance; CHURCH, Ch. J., ALLEN and FOLGER, JJ., concur.

MILLER, J., reads for reversal as to Donovan, and affirmance as to Westervelt; RAPALLO and ANDREWS, JJ., concur.

Judgment affirmed.

THE AMERICAN MEDICINE COMPANY, Appellant, *v.* ROBERT KESSLER, Respondent.

(Argued May 29, 1876; decided June 13, 1876.)

THIS was an action for conversion.

Plaintiff's evidence was to the effect, that in February, 1871, plaintiff was the owner of 3,524 bottles of medicine called "Zoeger's Remedy for Dyspepsia and Piles," which were contained in wooden and paper boxes, stored in the basement of No. 1378 Broadway, New York, which building was occupied by Zoeger. Plaintiff's agent sold to Zoeger 1,000 bottles, in paper boxes. In the month aforesaid a fire occurred in the building; plaintiff's agent visited the place after the

fire, and testified that he found 2,634 bottles remaining uninjured by the fire, except that some of the boxes were scorched. Soon after the fire the medicine was removed. In April, thereafter, plaintiff's president called at defendant's place of business and found a large quantity of boxes similar in appearance to those in which the medicine was kept, and, upon inquiry, defendant stated that he procured it at No. 1378 Broadway; that he removed all there was there, which he claimed to hold by virtue of a chattel mortgage from Zoegler. Defendant refused to deliver it on demand.

Upon this evidence plaintiff was nonsuited, upon the ground that he had failed to establish a conversion of the identical property. *Held*, error; that the evidence was sufficient to establish that it was the same property, and at least, the question should have been submitted to the jury.

J. A. Shoudy for the appellant.

Daniel T. Robertson for the respondent.

CHURCH, Ch. J., reads for reversal and new trial.
All concur.
Judgment reversed.

ANN H. PRESTON, Respondent, *v.* ELMORE P. ROSS, Appellant

(Argued June 1, 1876; decided June 13, 1876.)

George F. Comstock for the appellant.

Edwin Allen for the respondent.

Agree to affirm. No opinion.
All concur; ALLEN, J., not sitting.
Judgment affirmed.

THOMAS C. WALBRIDGE, Respondent, *v.* EDWARD D. JAMES et al., Appellants.

(Argued June 1, 1876; decided June 13, 1876.)

REPORTED below, 4 Hun, 793.

Edward D. James for the appellants.

John C. Hulbert for the respondent.

Agree to affirm. No opinion.
All concur, except MILLER, J., not voting.
Judgment affirmed.

ELIZABETH BORST, Respondent, *v.* THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, Appellant.

(Argued June 1, 1876; decided June 13, 1876.)

REPORTED below, 4 Hun, 346.

James M. Willett for the appellant.

Thomas C. Holmes for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

WILLIAM H. KNOEPFEL, Appellant, *v.* THE KINGS COUNTY FIRE INSURANCE COMPANY, Respondent.

(Submitted June 5, 1876; decided June 13, 1876.)

THIS was an action to restrain defendant from interfering with certain signs belonging to plaintiff.

Both parties were tenants of one Marquand, leasing basement offices on Liberty street, New York. Defendant occu-

pied the front office, and plaintiff an office in the rear, to which access was had through defendant's doorway. Defendant's lease was executed February 10, 1874, the term beginning April first, thereafter. The lease contained this clause: "The one-third, at least, of the front water-table on Liberty street is reserved for signs for the tenants of the rear offices, and such amicable arrangements for signs on the side entrance as may be agreed for." There was a printed rule on the back of the lease to the effect that no sign should be affixed on the building, except in such places as shall be designated by the lessor and indorsed thereon. Plaintiff's lease was executed February 12, 1874, the term beginning May first. Upon the back of it was the same printed rule; and, at the time of its delivery, a printed slip was handed to him, containing the clause above quoted from defendant's lease. Plaintiff claimed that there was a verbal agreement under which he begun moving in and arranging his office prior to May first, under which an arrangement was made for signs, but the arrangement was not definite. The landlord's agent testified that the only arrangement for signs was contained in the lease and memorandum. Plaintiff testified that he took possession April thirtieth. Prior to April twenty-third, on which day the action was commenced, plaintiff put up a sign in the center of the water-table, over the door, and a large sign at the side. He refused to make any arrangement with defendant as to signs on the side entrance, and defendant caused these signs to be removed.

Held, that all prior negotiations would be deemed to have been merged in the lease, and that it was not apparent how plaintiff could maintain an action commenced before and for acts done, prior to the time when the lease became operative; but, that aside from this, by a fair construction of the provisions referred to, plaintiff, while entitled to one-third of the water-table, could not put his sign in the center, and so divide the space to which defendant was entitled, but should have placed it on one side; that, as to signs upon the side entrance, before invoking the aid of a court of equity plaintiff should have used reasonable efforts to come to an amicable arrangement with defendant; and having refused to make

any such arrangement, plaintiff was not entitled to the relief sought.

Algernon S. Sullivan and *Robert Ludlow Fowler* for the appellant,

Davis & Lyon for the respondent.

MILLER, J., reads for affirmance of order and for judgment absolute against plaintiff.

All concur.

Order affirmed and judgment accordingly.

PETER J. RIPONT, Respondent, *v.* THE MERCHANTS' LIFE INSURANCE COMPANY, Appellant.

(Argued June 5, 1876; decided June 13, 1876.)

E. C. Sprague for the appellant.

Delavan F. Clark for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

JOHN H. HARNETT et al., Respondents, *v.* ANDREW J. GARVEY, Appellant.

In asking hypothetical questions, for the purpose of obtaining the opinion of experts, counsel may assume facts as they claim them to exist; and an error in the assumption does not make the interrogatory objectionable, if it is within the possible or probable range of the evidence.

(Argued June 5, 1876; decided June 13, 1876.)

THIS was an action to recover for alleged services as attorney and counsel.

One item of the account was for counsel and advice, and

giving an opinion as to the right of the State to maintain an action which had been begun in the name of the people against defendant. Plaintiff Harnett testified to the rendering the services; that he spent most of the time for two or three weeks in examining the question; and that defendant had told him the amount of property to be affected was about $500,000. Plaintiff then called an attorney as a witness, and asked him what would be a reasonable charge for counsel and advice, and the giving of an opinion as to the right of the State to maintain the action, occupying most of plaintiff's time for two or three weeks, where the amount of the property affected or to be affected was $500,000. This was objected to by defendant's counsel, on the ground that there was no evidence to sustain the assumption as to the value of the property. The objection was overruled, and defendant's counsel excepted. *Held*, that the question was proper, the court stating the rule as above.

Various other questions were presented as to the reception of evidence, which were disposed of in view of the circumstances of the case.

F. G. Smedley for the appellant.

E. H. Rankin for the respondents.

Per Curiam opinion for affirmance.
All concur.
Judgment affirmed.

JAMES H. MILLIMAN, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

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In an action to recover damages for injuries sustained by defendant's alleged negligence, plaintiff's evidence tended to show that he was a passenger on defendant's road; that the name of the station to which he was destined was called out, and the train stopped; that, as he reached the platform of the car, it started back with a sudden jerk, which threw him forward, and he fell through between the cars; that the train immediately started forward again, and while plaintiff lay on the

track he was struck by a car-wheel, either as the train moved backward or forward. The court charged, in substance, that if this was true, and the motion backward was caused by the engine, defendant was chargeable with negligence, and that it was immaterial whether the injury was caused by the motion forward or backward. *Held*, no error; that a jerking of a train backward, under such circumstances, was negligence, and that the latter part of the charge was to be interpreted as referring to the immediate, not to the proximate, cause of the injury.

The fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car, nor does it free the company from its duty to render to him, as a passenger, due care. It is the duty of a carrier of passengers to observe the same care to a drunken as to a sober passenger.

(Submitted June 5, 1876; decided June 13, 1876.)

THIS was an action to recover damages for injuries alleged to have been caused by defendant's negligence.

Plaintiff's evidence tended to show that he was a passenger on one of defendant's trains from Palmyra to Macedon; that when the train approached the latter station the whistle blew, the conductor called out the name of the station and the train stopped; as plaintiff reached the car door and was in the act of stepping out upon the platform the train started backward with a violent jerk, which threw plaintiff forward, and he fell down through, between the car and the one forward of it, on to the track; the train then started forward; plaintiff was struck by one of the wheels and was seriously injured. Defendant's evidence tended to show that plaintiff was intoxicated at the time. The court charged, among other things, as follows: "It is alleged that the defendant was negligent in the operation of the train; that after it had arrived at the station, and having given the signal, and after the train had been stopped for the purpose of enabling the passengers to alight, the train was suddenly and without warning moved, and the plaintiff was thrown between the cars and sustained the injury. It will not make any difference whether it was a motion backwards or forwards which occasioned the injury; if the injury was occasioned by that, the plaintiff's case is made out." The counsel for defendant "excepted to the charge, that it would be negligence to run either forward or backward." *Held*, that the exception was

not in the language of the charge, but that the charge was to be interpreted as referring to the immediate cause of the physical injury and not to the proximate cause, and as so interpreted was correct.

The court charged in substance, that the jerk backward must have been caused by the machinery attached to the train, to constitute negligence; that if it was simply the jerk sometimes occasioned by a train which is stopping, it would not establish negligence. Defendant's counsel requested the court to charge, "that unless the train was backed up by the power of the locomotive, the same being reversed for that purpose, there was no negligence on the part of the defendant." The court refused to charge other than as he had already charged. *Held*, no error.

Upon the question of intoxication, the court charged as follows: "An intoxicated man has a right to ride upon the cars. The defendant is as liable for an injury to the intoxicated man as well as to the sober man. Intoxication, as we all know—it is a matter of our observation if not experience—that intoxication makes a man less capable for the protection of his own life and limb. It tends to deprive a man of the ability to exercise that care. If you find that the plaintiff has failed to exercise the reasonable care for his own safety, whether from intoxication or not, he cannot recover. If you find that the plaintiff was intoxicated, that proof may go to render it more probable that he was guilty of that degree of negligence which would make it more improbable for him to recover. It would bear upon the probability or improbability, that the plaintiff was guilty of negligence which contributed to the injury which he sustained."

Defendant's counsel excepted to the charge, "in regard to defendant not being excused, if a man was injured although intoxicated;" and it was claimed on argument that a drunken man had no right to ride on a railroad train, citing *Putnam* v. *B. and Seventh Av. Railroad Co.* (55 N. Y., 108), and the provision of the statute authorizing the arrest of a man intoxicated in a public place. (Laws of 1857, chap. 628, § 17.) *Held*, that the charge was proper; that the decision referred to expressly recognized the right of the intoxicated man to ride

in a public car, so long as he kept quiet and did not interfere with others (p. 114); and that if the statute cited forbids an intoxicated man from appearing in a public place it affixes the penalty for so doing, and no one is authorized to punish him otherwise. The court stated the rule, substantially, as above.

W. H. Adams for the appellant.

J. H. Camp for the respondent.

FOLGER, J., reads for affirmance.
All concur; ALLEN, J., not sitting.
Judgment affirmed.

JOHN BOHNET, Appellant, *v.* LEOPOLD LITHAUER, Respondent.

(Submitted June 6, 1876; decided June 13, 1876.)

REPORTED below, 7 Hun, 238.

J. H. Cornell for the appellant.

David Leventritt for the respondent.

Agree to dismiss appeal. No opinion.
All concur.
Appeal dismissed.

JAMES G. PLUNKETT, by Guardian, etc., Respondent, *v.* WILLIAM H. APPLETON et al., Appellants.

(Argued June 6, 1876; decided June 13, 1876.)

Wm. G. Choate for the appellants.

Elliott F. Shepard for the respondent.

Agree to dismiss appeal. No opinion.
All concur.
Appeal dismissed.

THE PEOPLE'S SAFE DEPOSIT AND SAVINGS INSTITUTION OF THE STATE OF NEW YORK, Respondent, *v.* THOMAS BUCHANAN, Jr., Appellant.

Argued June 6, 1876; decided June 13, 1876.)

A. M. Beardsley for the appellant

W. Kernan for the respondent.

Agree to affirm. No opinion.
All concur.
Order affirmed.

JAMES G. POWERS et al., Appellants, *v.* ANTON GROSS, Respondent.

A plaintiff in an action, the subject-matter of which is within the jurisdiction of a court of a justice of the peace, cannot, by merely demanding judgment for a sum exceeding the jurisdiction of that court, oust it of jurisdiction, and thereby entitle himself to full costs in a superior court wherein he brings the action upon a recovery of a nominal sum; the recovery is conclusive of the amount in controversy, as affecting the question of costs.

Accordingly *held*, where plaintiff, in an action in the Supreme Court for the conversion of property, demanded judgment for $500, but recovered only thirty-five dollars, that defendant was entitled to costs.

(Submitted June 6, 1876; decided June 13, 1876.)

THIS was an action for the conversion of personal property, alleged in the complaint to be of the value of $446. Judgment was demanded for $500.

The case was tried by a jury, who rendered a verdict in favor of plaintiffs for thirty-five dollars. Both parties claimed to be entitled to costs, and presented their bills for taxation. The clerk taxed defendant's costs, and refused to tax plaintiffs'. Plaintiffs moved for an order setting aside the taxation, and directing the clerk to adjust costs in favor of plaintiffs, which motion was denied. (Reported below, 6 Hun, 234.)

Plaintiffs claimed that, as by section 304 of the Code, costs were allowed, of course, to plaintiffs upon a recovery in an action, of which a court of a justice of the peace had no jurisdiction (sub. 3), and by section 53 it was provided that justices of the peace should only have jurisdiction in an action for damages to rights pertaining to property, if the damages claimed do not exceed $200; and as the claim here was over that sum, a Justice's Court had no jurisdiction, and he was entitled to costs. *Held*, as above; the court stating that the actions referred to in subdivision 3 of section 304 are those in which, by section 54, a justice has no jurisdiction; that, while in an action in Justice's Court a plaintiff might put himself out of court by claiming over $200 damages, he could not by his own act affect the rights of his adversary and put him to the costs of a court of record by an excessive claim of damages.

Estes & Barnard for the appellants.

Dailey & Perry for the respondent.

ALLEN, J., reads for affirmance.
All concur.
Judgment affirmed.

IN THE MATTER OF THE APPLICATION OF THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY TO ACQUIRE LANDS OF LARRY GRAHAM.

IN THE MATTER OF THE APPLICATION OF THE SAME TO ACQUIRE LANDS OF ANDREW MYER.

IN THE MATTER OF THE APPLICATON OF THE SAME TO ACQUIRE LANDS OF WILLIAM JONES.

THESE appeals presented the same questions and were argued and decided with *In re New York Central and Hudson River Railroad Company* v. *Armstrong* (*ante*, p. 407).

THE MERCHANTS' BANK OF CANADA, Respondent, *v.* NELSON HOLLAND, Impleaded, etc., Appellant.

(Argued May 25, 1876; decided June 20, 1876.)

REPORTED below, 4 Hun, 420.

Wm. H. Greene for the appellant.

E. C. Sprague for the respondent.

Agree to affirm on opinion of referee and of General Term. Judgment affirmed.

WILLIAM H. DODGE, Respondent, *v.* THE VILLAGE OF CATSKILL, Appellant.

(Argued May 2, 1876; decided June 20, 1876.)

THIS action was brought to recover the amount of an award made to plaintiff in proceedings instituted by defendant under its charter (chap. 68, Laws of 1860) for lands proposed to be taken for a new street.

Upon petition of twelve freeholders a jury was summoned and impaneled, who assessed plaintiff's damages at $125. He made demand of that sum of the board of trustees. He was notified that there was no money in their hands to pay the same, and that the award would be presented at a meeting of the taxable inhabitants to be voted upon. The board subsequently called a meeting to vote a tax to pay the awards, and at such meeting the vote was against the tax. *Held*, that under said charter the discretion as to the amount of taxation and the object to which it shall be applied was reserved to the taxable inhabitants of the village, save where the amount is limited by the charter, or the tax, is local and partial in its effect; and that the final power of ratifying or defeating any plan of

the board of trustees needing the laying of a general tax, the limit in the amount of which is not fixed by the charter, which is the case here, rests with the taxable inhabitants. Also, *held*, that under the peculiar provisions of the charter the award of damages did not make the appropriation of the land a fixed fact so as to divest plaintiff of his title, as the final power of determining whether a street shall be opened, lands taken and damages paid therefor, is, under said provisions, vested in the taxable inhabitants, and no land is appropriated until an affirmative vote upon the tax for that object is given. If such vote is not given, the prior proceedings are nugatory, and the owner's title is unaffected. (*Buell* v. *Lockport*, 8 N. Y., 55; *Hawkins* v. *Rochester*, 1 Wend., 53.)

Jacob I. Werner for the appellant.

James B. Olney for the respondent.

FOLGER, J., reads for reversal and new trial.
All concur.
Judgment reversed.

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FRANCIS G. HALL, Appellant, *v.* WILLIAM ERWIN, Respondent.

Where one obtains an assignment to himself of a bond and mortgage by means of fraud, and with the ostensible purpose of selling the same for the owner, the equitable title remains in the assignor, and payment to him by the mortgagor is a satisfaction of the mortgage and a defence to an action brought by the assignee to foreclose the same.

Parol evidence is competent to show the circumstances attending the assignment.

Fraud may always be shown by parol, and when established will vitiate any transaction, however solemn.

Actual and clearly proved fraud will not be protected by the statute prohibiting parol trusts in real property. (2 R. S., 134, § 6.)

Plaintiff obtained judgment against W., of which there was unpaid about $700. Execution was issued thereon and a levy made on property of W. W., induced by fraudulent representations, assigned and delivered to plaintiff a bond and mortgage executed by defendant upon the understanding and agreement that plaintiff should sell the same, deduct from

the proceeds the amount of the judgment, and a sum agreed upon as compensation for his services, and pay the surplus to W. Plaintiff at the time held a note against W. for $2,500. On receiving the assignment, bond and mortgage, plaintiff assumed to own them, but refused to satisfy the judgment out of them or to abandon the levy unless W. would pay the note. Defendant paid the bond to W. In an action to foreclose the mortgage, *held*, that plaintiff was not entitled to hold the bond and mortgage for the amount of the execution; also, that as the question was not raised upon the trial, plaintiff then claiming the full amount of the bond and mortgage, and was not passed upon by the Supreme Court, it could not be raised here.

(Argued June 12, 1876; decided June 20, 1876.)

THIS action was brought to foreclose a bond and mortgage executed by defendant and wife to Jabez R. Ward, assigned by Ward to plaintiff, upon which there was claimed to be due and unpaid $2,200 and interest.

Defendant alleged and proved that Ward assigned the bond and mortgage under the following circumstances: Plaintiff and Lewis M. Smith had recovered a judgment against Ward upon which there was unpaid about $700; and execution had been issued and levied upon Ward's property and the same was advertised for sale; plaintiff also held a note against Ward for $2,500; by means of various false representations and fraudulent pretences, plaintiff induced Ward to execute to him a formal assignment of the bond and mortgage, he agreeing to negotiate a sale thereof, to retain out of it the amount of the execution, and the sum of $125 agreed upon for his services, and to pay the balance to Ward. After obtaining the assignment, bond and mortgage, plaintiff assumed to own them, but he refused to satisfy the judgment or to abandon the levy, or to pay Ward any thing until Ward should pay the note. *Held*, as above.

Upon a former trial, plaintiff obtained judgment; this was reversed by the General Term and judgment ordered for defendant. (60 Barb., 349.) The Commission of Appeals modified the judgment so as to grant a new trial. (57 N. Y., 642.)

E. H. Benn for the appellant.

R. King for the respondent.

ALLEN, J., reads for affirmance.
All concur, except ANDREWS, J., not voting.
Judgment affirmed.

WILLIAM WHITE, Appellant, *v.* ALFRED D. GODDARD, Respondent.

(Argued June 12, 1876; decided June 20, 1876.)

Albert Roberts for the appellant.

Wm. C. Dewitt for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

SYBLE CARD et al., Executors, etc., Respondents, *v.* CHARLES F. DURYEE, Appellant.

(Argued June 7, 1876; decided June 20, 1876.)

THIS was an action to recover moneys received by defendant from Jane Evans, plaintiffs' testatrix, and alleged to have been fraudulently converted by him.

The theory of the plaintiffs was, that defendant having in his hands a sum of money to invest for said Jane Evans, to secure a claim of his own, loaned the money upon a mortgage substantially worthless, which he palmed off upon Mrs. Evans. The jury rendered their verdict in the following words: "We hold the defendant responsible for the full amount claimed, viz., $2,884.40." It was objected on appeal that the verdict was not for fraud, but in form for a money demand. No objection was made on the trial to the form of the verdict

Held, that it must be assumed that the jury found the defendant responsible upon the law as laid down by the court, to wit, on account of the alleged fraud.

Defendant offered to prove by himself that he informed Mrs. Evans that her money was to be invested in the manner it was. *Held*, that the evidence was properly excluded under section 399 of the Code.

W. Grigg for the appellant.

Daniel T. Walden and *James W. Monk* for the respondents.

Per curiam opinion for affirmance of order, and for judgment absolute against defendant on verdict.

All concur.

Order affirmed and judgment accordingly.

George Cochran's Executor, etc., et al., Appellants, *v.* Oliver R. Ingersoll et al., Respondents.

It seems that where a series of orders have been granted by the court all relating to the same subject and so connected with each other that if one is wrong all are wrong, each order being but a part of the whole, the General Term on appeal from one or more of the orders having found them erroneous, may set aside the whole so that the records of the court may be consistent.

(Argued June 13, 1876; decided June 20, 1876.)

The plaintiffs herein appealed to the General Term from two Special Term orders, the one directing judgment on a *remittitur* from this court, the other denying a motion to vacate the judgment. The General Term reversed the order and also set aside an order of reference granted in pursuance of the judgment, the referee's report and an order confirming the same.

Upon appeal to this court the order of General Term was affirmed without an opinion. Subsequently, a motion was made for a re-argument, which was denied, without an opin-

ion. The motion was renewed. The principal point presented was that the General Term exceeded its power in setting aside orders and proceedings not appealed from. The court held, that there were two reasons why the motion ought to be denied:

First. The same motion has been made and peremptorily denied, and no leave has been given to renew.

Second. The *remittitur* having gone to the court below and having been filed there before the papers in this motion were served, the court has lost jurisdiction. But the court say there was no error committed by the General Term, as all the orders reversed and set aside were but a series connected with the same matter, and were but parts of the same theory, so that if one was erroneous all were, and that, in such case, the General Term was authorized to set aside the whole — leaving the records of the court clear and consistent — and that, therefore, if the court had jurisdiction it would refuse either to give leave to renew the motion for a reargument or would deny it if made.

P. V. R. Stanton for the appellants.

Winchester Britton for the respondents.

Order affirmed. No opinion.
All concur.
Order affirmed.

On second motion for reargument FOLGER, J., reads for denial of motion.

All concur.

Motion denied.

JOHN SIMMONS, Appellant, *v.* JOHN E. VAN ETTEN, Respondent.

(Argued May 29, 1876; decided September 19, 1876.)

M. Schoonmaker for the appellant.

John E. Van Etten for the respondent.

Agree to affirm. No opinion.
All concur.
Judgment affirmed.

EDMUND H. WATKINS, Appellant, *v.* TIMOTHY D. WILCOX et al., Respondents.

If property be given or granted to a society incorporated under either of the first three sections of the act of 1813 (chap. 60, Laws of 1813), providing for the incorporation of religious societies, by words vesting the title and not plainly uniting the right to hold with the faith or doctrine of any particular denomination or body, a change in the religious tenets or church discipline held by it at the time of the acquisition will not deprive the corporation of the property. The majority of the corporators control and may use the property for any purpose which is religious.

As to whether an action can be brought by an individual member of an incorporated religious society against its trustees to restrain the use for other religious purposes of property granted to it to be used solely for the purpose of conducting religious services in accordance with the forms and usages of a particular religious denomination, *quære*.

(Argued June 8, 1876; decided September 19, 1876.)

THIS action was brought by plaintiff, as a member and one of the corporators of a religious society incorporated under the general act for the incorporation of religious societies (chap. 60, Laws of 1813), against its trustees, to restrain the use of its church property for other purposes than to conduct religious services according to the forms, usages and constitution of the Protestant Reformed Dutch Church.

Said society was incorporated under the name of "The

Elders and Deacons of the Reformed Protestant Dutch Church of Ithaca." Property was purchased by it for church purposes. The conveyance did not specify any particular religious uses. The society so incorporated established ecclesiastical relations with the classis of the Reformed Dutch Church of Geneva and with the synods of that denomination. It continued in such relationship until December, 1872, when, by a vote of a large majority of its members, it severed this relation and became an independent religious organization, subject to no superior ecclesiastical judicatory. It retained, however, its faith and the same internal government as before and continued to accept and teach the same doctrines and religious belief. It changed its name to that of "The First Congregational Church of Ithaca" and employed a Congregational minister. The matter of ecclesiastical subordination to classis and synod was pronounced by the classis of Geneva to be voluntary, subject to be put off at the will of either party. The court, without passing upon the question of the right of plaintiff to maintain such an action, *held*, that in this case the equitable powers of the court could not be invoked: First. Because it was not shown that the property in question was conveyed or given to the society for any specific pious purpose, but it was acquired for general religious uses, and that in such case the majority of the congregation could control; the court stating the rule substantially as above, and citing *Robertson* v. *Bullions* (11 N. Y., 243), *Petty* v. *Tooker* (21 id., 267), *Gram* v. *The P. E. E. L. G. Society* (36 id., 161). Second. It did not appear that there had been such a diversion of the property of the corporation as would warrant a court of equity in interposing to restrain it; that the decision of the classis as to the right to sever connection with it not having been reversed or appealed from, was the law of the case (*Connitt* v. *R. P. D. Ch.*, 54 N. Y., 551); that the calling of a Congregational minister as pastor was not such diversion as it appeared that it was not unexampled or so unusual as to excite ecclesiastical attention in the Dutch Reformed Church. The opinion closes by quoting from the opinion of Gardiner, president, in *Gable* v. *Miller* (2 Den., 492, 548), as follows:

"It must be a plain and palpable abuse of trust which will induce a court of equity to interfere respecting a controversy growing out of a difference in religious and sectarian trusts."

S. D. Halliday for the appellant.

Marcus Lyon for the respondents.

FOLGER, J., reads for affirmance.
All concur, except RAPALLO and MILLER, JJ., not voting.
Judgment affirmed.

JOHN SCHREYER, Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

(Argued June 9, 1876; decided September 19, 1876.)

Francis L. Stetson for the appellant.

D. M. Porter for the respondent.

Agree to affirm. No prevailing opinion.
All concur except EARL, J., dissenting and writing dissenting opinion.
Judgment affirmed.

ELLEN CALLAHAN, Executrix, etc., Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

The Marine Court of the city of New York has no jurisdiction of an action against the city corporation.

The provisions of the acts of 1860 (chap. 879, Laws of 1860) and 1868 (chap. 853, Laws of 1868), giving to the Supreme Court of the first judicial district, the Court of Common Pleas for the city and county, and the Superior Court of the city, exclusive jurisdiction in all actions where the city corporation is a party defendant, are not repealed or affected by the provision of the act of 1872, relating to the Marine

Court (sub. 15, § 2, chap. 629, Laws of 1872), which gives to said court jurisdiction of actions against corporations created under the laws of this State, and having an office or transacting business in the city of New York; that provision is only applicable to private corporations.

The officers or agents of a municipal corporation cannot, by consent or omission to object, give to a court jurisdiction in an action against the corporation where the law has conferred elsewhere exclusive jurisdiction of actions against it.

Accordingly *held*, that the appearance and answer, by attorney for defendant, in an action brought in the Marine Court against the corporation of the city of New York, was not a waiver of the question of jurisdiction, and did not confer jurisdiction.

(Argued June 12, 1876; decided September 19, 1876.)

THIS was an action brought in the Marine Court to recover salary alleged to be due and unpaid plaintiff's testator, as assistant sergeant-at-arms of the board of aldermen. Defendant appeared and answered by attorney. At the close of the evidence said attorney moved to dismiss the complaint on the ground, among others, that the Marine Court "had no jurisdiction of the action or of the defendant," which motion was denied, and judgment directed for plaintiff. The judgment was affirmed by the General Term of the Marine Court, but was reversed by the General Term of the Court of Common Pleas. *Held*, as above.

Wm. F. McNamara for the appellant.

D. J. Dean for the respondent.

Per Curiam opinion for affirmance, for want of jurisdiction of the Marine Court.

All concur.

Judgment affirmed.

ERRATA.

In *Rathbone* v. *Hooney* (58 N. Y., 464) the word "Rathbone," at the beginning of the eleventh line from bottom of page, should be erased and "A. Brown" inserted.

In *Hassen* v. *City of Rochester* (65 N. Y., 517) the name of "Geo. W. Lord" as respondent's counsel should be erased and the name of "J. R. Perkins" inserted.

In case of *Samson* v. *Rose* (65 N. Y., 413) in twelfth line from bottom of page, erase "that month" and insert "September thereafter."

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APPEAL.

1. The admission of improper evidence in proceedings before a surrogate for the probate of a will is not ground for reversal of his decision admitting the will to probate, if it appears from the whole case that the will was properly sustained. *Brick* v. *Brick.* 144

2. In reviewing a decision of the General Term reversing a judgment entered upon the report of a referee, where it is certified that the order of reversal was made upon questions of fact as well as law, this court occupies the position of the General Term as to the facts as well as the law. *Godfrey* v. *Moser.* 250

3. Where a review of facts by an appellate court is proper, it is, as a general rule, its duty to examine the evidence and determine the facts for itself; and the rule that where there is conflicting evidence or any evidence to sustain the finding it is error to reverse, does not apply. (Code, §§ 268, 348.) *Id.*

4. Where, in reviewing a judgment entered upon the report of a referee in an action upon an account, the General Term find certain items of said account to have been established by the evidence and others not, it is entirely within its discretion whether to permit the judgment to stand at the election of the plaintiff for the items it approved, or to reverse the whole judgment and order a new trial (Code, § 330), and the exercise of this discretion is not reviewable here. *Id.*

5. Where, upon appeal to this court from an order of General Term granting a new trial on a case or exceptions, the court determines

that no error was committed, it is imperative that "they shall render judgment absolute upon the right of the appellant" (Code, § 11, sub. 2); and, although injustice may be done him, the court has no authority to allow him to withdraw his stipulation for "judgment absolute" or to give him the benefit of a new trial; when, instead of availing himself of the new trial granted by the court below, he appeals, he necessarily assumes the hazard of injurious consequences. *Id.*

6. A party to an action tried by jury, who has not, by treating the questions in the case as purely legal, and by acquiescing in their disposal by the court as such, assumed that there was no disputed question of fact for the jury, but who has been nonsuited upon the motion of his adversary over his objection and exception, may insist, upon appeal, not only that the judge at Circuit erred in the application of the law to the facts as found by him, but that he erred in his conclusions of fact, or that there were disputed questions of fact which should have been submitted to the jury; he is not concluded by an omission to request the court to submit the whole case or any particular question of fact therein. *Clemence* v. *City of A.* 334

7. An order of General Term affirming an order of Special Term reviving against his executors a special proceeding instituted against a discharged trustee, and pending at his death, is not appealable to this court; it is not "a final order affecting a substantial right made in a special proceeding" within section 11 of the Code (sub. 3), but an intermediate order relating to the procedure. *In re Whittlesey* v. *Hoguet.* 358

8. Where, in an action to set aside conveyances of real estate as obtained by fraud, an interlocutory judgment has been rendered determining the title to be in plaintiff, subject to certain liens of defendant, and directing an accounting, and where, by consent, a receiver has been appointed to receive the rents during the accounting, it is within the discretion of the court to order the receiver to pay over the rents collected to the plaintiff upon such terms as it may deem proper. *Platt* v. *Platt.* 360

9. The exercise of this discretion may be reviewed by the General Term, but not by this court, and the order of the General Term thereon is not appealable. *Id.*

10. Where the copy of pleadings, furnished the court upon trial, contains a reply to a counter-claim set up in the answer, it is within the discretion of the court whether to receive proof that no reply was, in fact, served or to leave defendant to his remedy by motion after trial, and its determination is not reviewable here. *Miller* v. *Barber.* 558

11. Where a motion to vacate a judgment taken by default is made both on the ground of mistake, inadvertence, surprise or excusable neglect, and also on the ground of fraud, and the facts warrant the granting of the motion on the latter ground, it will be presumed, on appeal from an order of General Term, affirming an order granting the motion, as against an objection, that the order was granted more than a year after notice of judgment, and so was improper under section 174 of the Code; that the order was granted on the ground of fraud, and the limitation of said section does not apply. *Dinsmore* v. *Adams.* 618

12. Such an order is not reviewable here. *Id.*

13. *It seems* that where a series of orders have been granted by the court all relating to the same subject and so connected with each other that if one is wrong all are wrong, each order being but a part of the whole, the General Term on appeal from one or more of the orders having found them erroneous, may set aside the whole so that the records of the court

may be consistent. *Cochran's Exrs.* v. *Ingersoll.* 652

—— *Where, upon motion, the point that it is in the discretion of the court either to entertain motion or to turn party over to action is not raised, but motion is denied on merits, the point cannot be raised on appeal.*

See Cole v. *Malcolm*, 363.

—— *When question not raised upon trial, cannot be raised upon.*

See Hall v. *Erwin*, 649.

Higgins v. *N. and F. R. R. Co.* (Mem.), 604.

—— *Insufficiency of exception to present question on.*

See Keogh v. *Westervelt* (Mem.), 636.

ASSESSMENT AND TAXATION.

1. A purchaser, at a legal tax sale, of land upon which there is at the time a mortgage duly recorded, upon receipt of the comptroller's deed, acquires a valid title, subject to the right of the mortgagee to redeem under the statute. (Chap. 427, Laws of 1855, § 76, *et seq.*) *Becker* v. *Howard.* 5

2. The mortgagee may, at any time within six months after receiving notice of sale, redeem; but he is not compelled to await the reception of such notice before redeeming. *Id.*

3. The purchaser at the tax sale is not compelled to give any notice to the mortgagee in order to perfect his title. He can, however, only limit the time for redemption by giving notice. *Id.*

4. A purchaser at such a sale is not affected by a subsequent foreclosure of the mortgage and sale of the mortgaged premises, where he is not made a party to the foreclosure. *Id.*

5. A municipal corporation seeking to affect property within its jurisdiction by taxation, or proceedings in the nature thereof, must produce express power therefor in legislative enactment, and must show that it has strictly followed all the legal requirements. *Id.*

6. The power of the corporation of the city of New York to assess for local improvements all property benefited thereby is limited by the provision in the act of 1840 (§ 7, chap. 326, Laws of 1840) prohibiting an assessment exceeding half the value of the property, as valued by the general tax assessing officers, and can only be exercised as to property which has been previously valued by said officers, and then only to an amount not greater than half the value named by them. (RAPALLO and ANDREWS, JJ., dissenting.) *In re Second Avenue M. E. Church*, 395

7. This proviso applies as well to property of religious corporations used for religious purposes on which, as it is exempted from taxation, the assessors of the ward are not required by law to make a valuation as to other property. (RAPALLO and ANDREWS, JJ., dissenting.) *Id.*

8. Accordingly, *held* (RAPALLO and ANDREWS, JJ., dissenting), where, upon a motion to vacate an assessment upon such property, it did not appear that there was an assessment roll made by the tax commissioner and deputy upon which the property appeared, with a valuation attached that the assessment was illegal and void. *Id.*

9. Also, *held*, that the acts of 1874 (chaps. 312 and 313, Laws of 1874), providing that no assessment for a local improvement shall be vacated for an omission in the performance of any official duty, or in carrying out the details of a law or ordinance, or for any defect in authority, or for any irregularity, did not apply, as it was not simply a defect, omission or irregularity, but a total absence of power; and that, therefore, the assessment was properly vacated. *Id.*

10. In pursuance of a contract made November 5, 1870, plaintiff, deeded to defendant certain premises in the city of New York, December 5, 1870, with a covenant that

they were free from all *charges*, assessments and incumbrances. An assessment against plaintiff upon the premises for a street improvement, was confirmed by the board of revision and correction of assessments, November 7, 1870, but the title of the assessment was not entered in the title-book of assessments, in the bureau of arrears, until December twenty-fourth. In an action to recover the assessment, *held* (RAPALLO, J., dissenting), that the provisions of the acts relating to the collection of arrears of assessments, etc., in the city of New York (§ 6, chap. 579, Laws of 1858; § 1, chap. 381, Laws of 1871), declaring that no assessment shall be deemed to be confirmed so as to be a lien on property included in it, until the title shall be entered in said title-book as prescribed, did not affect plaintiff's liability under the covenant; that the assessment was fairly embraced in its terms; and that plaintiff was bound to pay the same. *DePeyster* v. *Murphy*. 622

—— *Amount of, under charter of village of Catskill to be determined by taxable inhabitants.*

See Dodge v. *Village of C.* (Mem.), 648.

ASSIGNMENT.

1. A payment upon a bond and mortgage made by the mortgagor to the mortgagee, after an assignment thereof by the latter, when made in good faith, without notice, actual or constructive, of the assignment, is valid. *Van Keuren* v. *Corkins*. 77

2. The fact that payment was made before due is no evidence of bad faith; nor is a want of good faith to be inferred from the facts that the bond and mortgage were not produced and payment indorsed thereon when made; or were not produced when payment in full was made, and satisfaction of the mortgage executed, or that no inquiries were made in regard to them; a failure to produce the instruments is not sufficient to put the mortgagor upon inquiry. *Id.*

3. A receipt given by the mortgagee at the time of payment is proper evidence in an action by an assignee, as part of the *res gestæ*. *Id.*

4. Where a mortgage which has been assigned, but the assignment not recorded, is satisfied of record by the mortgagee, a subsequent mortgagee is a "subsequent purchaser," within the recording act (1 R. S., 762, §§ 37, 38); and as to him the assignment is void. *Id.*

5. Where one obtains an assignment to himself of a bond and mortgage by means of fraud, and with the ostensible purpose of selling the same for the owner, the equitable title remains in the assignor, and payment to him by the mortgagor is a satisfaction of the mortgage and a defence to an action brought by the assignee to foreclose the same. *Hall* v. *Erwin*. 649

—— *Equitable, of provision for support in will, what is.*

See Thurber v. *Chambers*, 42.

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. An assignment for the benefit of creditors made by an insolvent debtor, in good faith, without intent to defeat the object, impair or impede the operation, or evade any of the provisions of the bankrupt act, and which transfers all his property without preferences, is not in violation of the spirit and intent of said act, and so is not void *per se*. *Haas* v. *O'Brien*. 597

2. The fact that proceedings in bankruptcy are taken against the assignor within six months after the execution of the assignment, does not affect its validity. *Id.*

3. The act was not intended to interfere with the action of a debtor, who, in good faith, with no fraudulent intent, voluntarily seeks to apply his property toward the payment of his debts in equal proportions, precisely as it would have been applied had proceedings been taken under the act. Various

United States District Court bankruptcy cases disapproved and distinguished. *Id.*

4. Upon an issue as to whether an assignee for the benefit of creditors has paid a preferred creditor, evidence tending to show that the assignee has not paid another preferred creditor in the same class is incompetent. *Whintringham* v. *Dibble.* 634

BANKRUPTCY.

1. An assignment for the benefit of creditors made by an insolvent debtor, in good faith, without intent to defeat the object, impair or impede the operation, or evade any of the provisions of the bankrupt act, and which transfers all his property without preferences, is not in violation of the spirit and intent of said act, and so is not void *per se.* *Haas* v. *O'Brien.* 598

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BANKS AND BANKING.

Where, after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank of an amount sufficient to pay the note, this does not of itself, as between the bank and an indorser, operate as a payment. In the absence of any express agreement or directions, it is optional with the bank whether or not to apply the money in payment; it is under no legal obligation so to do. *Nat. Bk.* v. *Smith.* 271

BEQUEST.

—— *When provision for support is, and when it is a charge on real estate. See Thurber* v. *Chambers,* 42.

BILLS, NOTES, CHECKS.

1. Interest coupons to railroad bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and are subject to the same rules as other negotiable instruments. They are transferable by delivery, although detached from the bonds, and a purchaser in good faith before maturity from one who has stolen them acquires a valid title. *Everton* v. *National Bank.* 14

2. The fact that by their terms they are declared to be for interest up on bonds specified by their numbers does not destroy their negotiability when separated from the bonds, or impair the title of one purchasing from another without production of the bonds. *Id.*

3. Such instruments are entitled to days of grace; and one purchasing after the expiration of the time of payment specified, but before the expiration of the days of grace, is a purchaser before maturity. *Id.*

4. Where, however, interest coupons or warrants to such bonds are not made payable to bearer or order, they are not negotiable when separated from the bonds, although the latter are themselves negotiable, and a purchaser of these detached instruments takes them subject to all defects in the title of transferrer, and therefore subject to the claims of the true owner in case they have been stolen. *Id.*

5. As to whether the parties to an instrument can give it a negotiable character with all the incidents pertaining to negotiable paper

when it is not, in terms, within the class of instruments known in the law as negotiable, *quære.* *Id.*

3. Plaintiffs discounted certain bills of exchange drawn by defendants upon A. & N., of Liverpool, secured by bills of lading of shipments of corn consigned to A. & N. under an agreement that if the bills of exchange were accepted by the drawees and the acceptances were satisfactory to plaintiffs' correspondents, the bills of lading were to be delivered up to the consignees. If the bills of exchange were not accepted, or if the acceptances were not satisfactory, said correspondents were authorized to place the corn in the hands of brokers, to be selected by them, for sale, the proceeds to be applied to pay the bills of exchange. The consignees, after the arrival of the corn, and before the maturity of the said bills, had contracted for its sale through C. & Co., brokers. When the bills reached Liverpool they were presented and accepted, plaintiffs' correspondents, however, retaining the bills of lading. The consignees procured and filled out blanks for undertakings, which were signed by C. & Co., by which, in substance, they agreed to hold the bills of lading and the corn in trust to secure the payment of the bills of exchange and to apply the proceeds for that purpose. Each of these undertakings were indorsed "The within engagement signed at our request," which was signed by A. & N. Upon receipt thereof plaintiffs' correspondents delivered up the bills of lading to C. & Co., who sold the corn, misapplied the proceeds, and thereafter failed. In an action upon the bills of exchange, *held*, that it was to be inferred that plaintiffs' correspondents were not satisfied with the acceptances; that the acceptors could, within the terms of the agreement, make the acceptances satisfactory in any of the usual modes, of which it appeared that the giving of such undertakings was one; that the indorsements upon the backs thereof were equivalent to requests on the part of A. & N., plaintiffs' correspondents, to deliver the bills of lading to C. & Co. upon receipt of the undertakings; that C. & Co. were the brokers of A. & N., and a delivery of the bills of lading to the former was in effect a delivery to the latter, and that defendants were liable. *Magoun* v. *Sinclair.* 30

7. *It seems*, the general rule that an indorser of a promissory note contracts that the instrument itself and the antecedent signatures are genuine does not apply where the holder has procured an indorsement upon a forged note with knowledge of the forgery and upon a representation to the indorser that it was genuine, or where the holder received the note after maturity and without consideration from one who so procured the indorsement. *Turner* v. *Keller.* 66

8. G. having failed in the butchering business, his brother H. bought out the business, and authorized G. to carry it on in his name. H. told E., of whom G. had been in the habit of purchasing cattle for the business, that, as he was carrying on the business, he would be responsible for all cattle sold to G. It was necessary and had been customary to give notes for cattle purchased. G. signed the name of H. to notes given to E. for cattle, which defendant K. indorsed upon the representation of E. that H. had signed them. Defendant knew the facts as to method of conducting the business, and had indorsed a large number of notes signed in the same way. In an action upon the notes, *held*, that the facts authorized an inference that G. had authority to sign notes in the name of H., and so justified a finding that the notes were made by H. *Id.*

9. Defendant having given evidence tending to show that E. induced G. to sign the name of H. to the note, knowing that G. had no authority, and after authority was sought to be proved by the circumstances above stated, E., as a

witness for plaintiff, was allowed to testify, under objection and exception, that at the time G. signed he supposed and believed that G. had authority so to sign. *Held*, no error. *Id.*

10. Also, that it was competent to prove that E. gave credit to H. after the conversation with him above stated. *Id.*

11. Plaintiff and B. were copartners, the latter being the managing partner which was known to defendant, he having done considerable business with the firm. B. negotiated a loan for his individual benefit from one C. to be made upon a satisfactory note. He drew a note for the amount, to which he signed the firm name, and defendant, at his request, signed as surety, supposing it to be for the benefit of the firm. C. objected to the note because it was signed in the firm name and requested one signed by the members individually. A new note was drawn signed by B., and by plaintiff without adding the word "surety" to his name, and then by defendant. Plaintiff did not know of the making of the first note until the second note was presented to him for signature, when he was informed of it and was told the reason of the change, and that defendant would sign the second note. In an action to enforce contribution, *held*, that plaintiff, although having no affirmative knowledge, was bound to presume ignorance on the part of defendant of the character of the first note from its form and the manner of signing it, and also to presume that B. would inform him, when he was applied to for his signature to the second note, of the reason why a change was desired; that he impliedly authorized B. to continue the deception by not requesting him to inform defendant of the character of the loan or affixing "surety" to his name; and that, therefore, plaintiff knowing facts charging him with knowledge that defendant signed, and intended to sign, as surety for him, and by silence and implied authority having contributed to induce him to again sign in the same character, he was not entitled to contribution *Wells* v. *Miller*. 255

12. Where, after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank of an amount sufficient to pay the note, this does not of itself, as between the bank and an indorser, operate as a payment. In the absence of any express agreement or directions, it is optional with the bank whether or not to apply the money in payment; it is under no legal obligation so to do. *Nat. Bk.* v. *Smith*. 271

12. The delivery by a debtor to a creditor of a promissory note of a third person, as collateral security for, or as conditional payment, in part, of his debt, is equally an acknowledgment of liability for the whole debt, as would be an absolute payment, and is equally effectual to suspend the operation of the statute of limitations. *Smith* v. *Ryan*. 852

13. It is, however, only evidence of an acknowledgment and promise to pay at the time of the delivery of the note, not at the time of its maturity or when it is paid by the maker; the latter is not constituted agent of the debtor to renew the promise by payment, whether made at maturity or afterwards, and the statute begins to run from the time of the delivery. *Id.*

14. In an action by an indorser of a promissory note, who has paid the same, against a prior indorser, it is competent for defendant to prove by parol that all the indorsers were accommodation indorsers, and by agreement they were, as between themselves, cosureties. *Easterly* v. *Barber*. 433

15. In such an action it appeared that the holder of the note sued the note and collected it of the subsequent indorser, at the request of, and under an arrangement with, the prior indorser who thereupon gave security

Held, that this did not estop the latter from setting up the agreement between the indorsers. *Id.*

16. Evidence was given tending to show that the agreement was made in reference to a prior note which had been renewed from time to time until the note in question was given. The court charged, in substance, that if this was so, and if the last note was signed with the arrangement resting upon the minds of the indorsers, the jury would have no doubt in coming to the conclusion that the agreement attached to the last note. *Held*, no error. *Id.*

17. There were four indorsers, between whom the agreement was made. Two were not parties. It was proved that they were insolvent, and plaintiff recovered judgment for half the note. *Held* (CHURCH, Ch. J., dissenting), that the action being one of law against one of the co-sureties, plaintiff was only entitled to recover defendant's proportion, to wit: one-fourth of the debt; that in order to make defendant liable for the one-half because of the insolvency of the others, an action in equity against all should have been brought; also, that the pleadings could not be changed to conform to the facts, as the proper parties were not before the court. *Id.*

BILL OF LADING.

—— *Securing bill of exchange, effect of delivery of.*
See Magoun v. *Sinclair*, 30.

BONA FIDE HOLDER.

1. Interest coupons to railroad bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and are subject to the same rules as other negotiable instruments. They are transferable by delivery, although detached from the bonds, and a purchaser, in good faith before maturity, from one who has stolen them, acquires a valid title. *Everton* v. *Nat. Bk.* 14

2. Such instruments are entitled to days of grace; and one purchasing after the expiration of the time of payment specified, but before the expiration of the days of grace, is a purchaser before maturity. *Id.*

3. Where, however, interest coupons or warrants to such bonds are not made payable to bearer or order, they are not negotiable when separated from the bonds, although the latter are themselves negotiable, and a purchaser of these detached instruments takes them subject to all defects in the title of his transferrer; and therefore subject to the claims of the true owner in case they have been stolen. *Id.*

4. One who, either with or without notice of a prior unrecorded mortgage, takes a mortgage or conveyance of land as security for an existing debt, without giving up any security or divesting himself of any right, or doing any act to his own prejudice, on the faith of the title, is not a *bona fide* purchaser for value within the meaning of the recording act (1 R. S. 756, § 1), and as against him the prior mortgage is valid. *De Lancey* v. *Stearns*. 157

5. An assignee, for value, of the subsequent mortgage, or grantee for value, claiming under the subsequent deed, stands in no better position than the mortgagee or original grantee. *Id.*

6. In March, 1866, plaintiffs obtained judgment by default against C., and levied upon his interest in a stock of goods of a copartnership of which he was a member; by stipulation the judgment was opened, and C. allowed to come in and defend, all proceedings on the execution to be suspended "until otherwise ordered;" directions to that effect were given to the sheriff, and the firm continued its business without interference. C. died in July 1867; his administrators had an accounting and settlement with the surviving partners, who did not know of the levy, and C.'s interest in the firm

was, for a good consideration, transferred by the administrators to W., one of the survivors. The administrators were substituted as defendants in C.'s place in said action. In March, 1868, judgment was perfected therein in favor of plaintiff, whereupon the sheriff, by direction of plaintiff's attorney, sold the interest of C. in the partnership assets, and plaintiff became the purchaser. In an action brought by him against the surviving partners for an accounting, *held*, that the execution had, by the conduct of the plaintiff, and the delay of the sheriff under his directions, become dormant as against *bona fide* purchasers, in which position W. stood; and that the settlement and transfer made by C.'s administrators were conclusive upon plaintiff. *Sage* v. *Woodin*. 578

—— *When owner of property, who has authorized delivery of warehouse receipt, is estopped from claiming title as against bona fide holder.*

See Voorhis v. *Olmstead*, 113.

BONDS.

1. The sureties upon the bond of a public officer are liable thereon only for the defaults of their principal committed after the commencement of the term of office for which they became his sureties. Although their principal held the office during a preceding term, they are not liable for a defalcation which then occurred. *Bissell* v. *Saxton*. 55

2. In such case those who were sureties for the officer for the prior term must be looked to. *Id.*

3. In an action upon a bond of an officer, his official reports are not conclusive as against his sureties, but mere admissions of the principal, subject to explanation. *Id.*

4. Accordingly, *held*, that the official reports of railroad commissioners charging themselves with a certain fund were not conclusive against their sureties in an action upon their bond, that the commissioners then had the fund on hand; and, it appearing that the fund had in fact been received and converted by one of their number during a prior term, that the sureties were not liable. *Id.*

5. So, also, *held*, that statements made by the principals upon applying for a reappointment were not conclusive against the sureties. *Id.*

6. The said commissioners were appointed under the act of 1856 (chap. 64, Laws of 1856) authorizing subscriptions by towns to the stock of the A. and S. R. R. Co. By the act of 1867 (chap. 747, Laws of 1867), amendatory of said act, each town commissioner is required to account annually for moneys coming into his hands, "with the interest thereon, provided such moneys have been used or loaned by him." *Held*, that this provision did not authorize a commissioner to use the funds in his hands in his individual business; and that, in case he did so and failed to restore them, it was a conversion of the funds and a defalcation. *Id.*

7. Plaintiff's complaint contained two counts; the first alleged the making and delivery by defendants of their bond conditioned to pay B. and Y. $5,000, and an assignment, for value, by the obligees to plaintiff; the second alleged that defendants covenanted, under their hands and seals, to pay B. and Y. $4,000, who assigned the covenant, for value, to plaintiff. It appeared that defendants and B. and Y. were stockholders in a company, and agreed with plaintiff for a loan to the company of $4,000, to be secured by a mortgage of its real estate, and by the bond of defendants, under which agreement the bond described in complaint was given. *Held*, that it was not necessary to aver the facts under which the bond was given, and that the evidence established the causes of action set forth in the complaint. *Brown* v. *Champlain*, 214

8. The contract was claimed to be usurious; first, because the bond was conditioned to pay $5,000, when but $4,000 was loaned; second, that for $2,000 of the loan plaintiff gave his notes for twenty and thirty days, without interest. In the assignment of the bond it was stated that it was to secure the payment of $4,000, and it was intended and treated by the parties as a security for that sum only. The giving of the notes was not found to have been done with intent to secure more than lawful interest. *Held*, that, for the purpose of sustaining the judgment, a finding that there was no such intent might be implied, and that the circumstances did not constitute usury in law. *Id.*

9. It appeared that defendants refused to consent to the delivery of the bond to the plaintiff unless B. and Y. would agree to become equally liable with them for the payment of the money loaned. B. and Y. therefore indorsed on the bond the following: "For value received, we become jointly liable, in all respects, with the original makers of the within bond." This was not under seal. Plaintiff had no connection with or knowledge of this transaction. Defendants claimed a defect of parties, in that B. and Y. were not made parties. *Held*, untenable; that the form of the undertaking signed by B. and Y. was not apt and proper to constitute them joint obligees; that the fair inference therefrom was, that it was simply to secure to defendants the right of contribution against B. and Y.; that, if plaintiff could maintain an action thereon, the instrument must be treated as a guarantee. *Id.*

10. Defendants offered to show on trial, by B. and Y., that they intended, by signing the indorsement, to adopt the seals of the obligors; this was objected to, and objection sustained. *Held*, no error; that the intent was immaterial, as the question whether they did adopt the seals depended upon what they did and said, not what they intended. *Id.*

11. In an action against sureties upon a bond given by an agent for the faithful performance of his duties, the surrounding circumstances and the situation of the parties, at the time of its execution, may be considered in construing its terms, in case of ambiguity therein. *W. N. Y. L. Ins. Co.* v. *Clanton.* 328

12. It is no defence to an action upon such bond that the sureties were ignorant as to the extent of the obligation assumed, or were misled by the principal in reference thereto, in the absence of proof that the obligee was a party to the fraud; it is not the duty of the obligee to seek out the sureties and explain to them the nature and extent of their obligation, but it is for the sureties to ascertain for themselves. *Id.*

13. Defendant De W. W. C., as principal, and the other defendants, as sureties, executed a bond to plaintiff reciting the appointment of De W. W. C. as agent for plaintiff "for the purpose of procuring applications for life insurance and collecting premiums thereon." Plaintiff and De W. W. C. had entered into two contracts, the first appointing the latter as general agent to procure applications for, and to effect all kinds of, insurance authorized by plaintiff, he to retain a certain per centage and to account for, and pay over, the residue; by the second, De W. W. C. agreed to collect renewal premiums on policies issued through a former general agent, he to receive a per centage, but to apply the same toward the purchase of the renewals until he had paid $1,000, when the said renewals were to be assigned to him and he to be entitled thereafter to retain the per centage. The former contract was shown to the sureties when they executed the bond; it did not appear that they saw or knew of the latter. In an action upon the bond, *held*, that it embraced within its terms the premiums collected

under both contracts, and that it was immaterial that defendants had no knowledge as to the second. *Id.*

—— *Interest coupons of railroad bonds, when negotiable instruments.*
See Everton v. *Nat. Bk. of M.*, 14.

—— *Of municipal corporations issued to pay for railroad stock, validity of.*
See Williams v. *Town of D.*, 129.

BROKERS.

1. Plaintiffs discounted certain bills of exchange drawn by defendants upon A. & N., of Liverpool, secured by bills of lading of shipments of corn consigned to A. & N. under an agreement that if the bills of exchange were accepted by the drawees, and the acceptances were satisfactory to plaintiffs' correspondents, the bills of lading were to be delivered up to the consignees. If the bills of exchange were not accepted, or if the acceptances were not satisfactory, said correspondents were authorized to place the corn in the hands of brokers, to be selected by them, for sale, the proceeds to be applied to pay the bills of exchange. The consignees, after the arrival of the corn, and before the maturity of the said bills, had contracted for its sale through C. & Co., brokers. When the bills reached Liverpool they were presented and accepted, plaintiffs' correspondents, however, retaining the bills of lading. The consignees procured and filled out blanks for undertakings, which were signed by C. & Co., by which, in substance, they agreed to hold the bills of lading and the corn in trust to secure the payment of the bills of exchange, and to apply the proceeds for that purpose. Each of these undertakings were indorsed "The within engagement signed at our request," which was signed by A. & N. Upon receipt thereof, plaintiffs' correspondents delivered up the bills of lading to C. & Co., who sold the corn, misapplied the proceeds, and thereafter failed. In an action upon the bills of exchange, *held*, that it was to be inferred that plaintiffs' correspondents were not satisfied with the acceptances; that the acceptors could, within the terms of the agreement, make the acceptances satisfactory in any of the usual modes, of which it appeared that the giving of such undertaking was one; that the indorsements upon the backs thereof were equivalent to requests on the part of A. & N., plaintiffs' correspondents, to deliver the bills of lading to C. & Co. upon receipt of the undertakings; that C. & Co. were the brokers of A. & N., and a delivery of the bills of lading to the former was in effect a delivery to the latter; and that defendants were liable. *Magoun* v. *Sinclair*. 30

See STOCK BROKERS.

BUILDING CONTRACTS.

1. By the terms of a building contract between defendant, owner, and B., contractor, it was provided that if, during the progress of the work, the contractor refused or neglected to supply sufficient materials or workmen, defendant, after three days' notice, might provide them to finish the work, and deduct the expense from the amount of the contract. Defendant, on the default of B., gave the three days' notice, and thereafter expended, in labor and material, to complete the work, a sum which, with the amount paid B., was $778.90 less than the contract-price. In an action to foreclose a mechanic's lien for materials for the building sold B., *held*, that defendant, by electing to go on under said clause in the contract, waived the right to insist upon a forfeiture, and that plaintiff was entitled to judgment for the balance unpaid. *Murphy* v. *Buckman*. 297

—— *Where parties attempting to settle under, misunderstand each other, effect of.*
See Slater v. *Emberson* (Mem.), 615.

BURDEN OF PROOF.

1. In an action against a sheriff for falsely returning an execution

nulla bona, the burden is upon plaintiff to show that there was property upon which defendant, by the exercise of proper diligence, could have levied, not upon defendant to show that he could find none. *Watson* v. *Brennan*. 621

CANCELLATION OF WRITTEN INSTRUMENT.

—— *When insurance company authorized to cancel policy.*
See I. L. and T. Co. v. *F. F. I. and T. Co.*, 119.

CATSKILL (VILLAGE OF.)

—— *Provisions of charter as to taxation construed; and when title to lands sought to be taken under, for street purposes, vests.*
See Dodge v. *Village of C.* (Mem.), 648.

CASES REVERSED, DISTINGUISHED, LIMITED, OVERRULED AND DISAPPROVED.

People ex rel. Tweed v. *Liscomb* (60 N. Y., 559), distinguished. *People ex rel. Woolf* v. *Jacobs*. 10

Beck v. *East River Ferry Co.* (6 Robt., 82), distinguished. *Robinson* v. *N. Y. C. and H. R. R. R. Co.* 13

Brown v. *N. Y. C. R. R. Co.* (32 N. Y., 597), limited. *Robinson* v. *N. C. and H. R. R. R. Co.* 14

Everton v. *Nat. Bank of Newport* (4 Hun, 692), reversed. *Everton* v. *Nat. Bank of Newport*. 14

Myers v. *Y. and C. R. R. Co.* (43 Me., 232), disapproved. *Everton* v. *Nat. Bank of Newport*. 18

Jackson v. *Y. and C. R. R. Co.* (43 Me., 147), disapproved. *Everton* v. *Nat. Bank of Newport*. 18

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S., 330), reversed. *McCall* v. *Sun Mut. Ins. Co.* 505

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CAUSE OF ACTION.

—— To set aside judgment for fraud as against infant defendants.
See McMurray v. *McMurray*, 175.
—— Against municipal corporation for injuries resulting from overflow of sewer, what proof necessary to sustain.
See Smith v. *The Mayor*, 295.
—— For construction of will.
See Fisher v. *Banta*, 468.
—— By mortgagee to restrain sale of fixtures.
See McRea v. *C. N. Bk.*, 489.

CEMETERY ASSOCIATION.

1. The use of lands for the purposes of rural cemetery associations, incorporated under the general law (chap. 133, Laws of 1847, as amended by chap. 280, Laws of 1852, and chap. 245, Laws of 1874), is private, not public. *In re D. C. Assn.* 569

2. The provision, therefore, of the act of 1873 (chap. 452, Laws of 1873), authorizing the taking of lands for the purposes of such an association, by proceeding *in invitum*, is unconstitutional and void. *Id.*

CHARTER PARTY.

1. Plaintiffs chartered defendant's brig "for a voyage from New York to Nassau, thence to Great Isaacs and back to Hampton Roads for orders to discharge at either Baltimore, Philadelphia or New York." Plaintiffs to furnish a full cargo, "or sufficient to ballast, or ballast during the voyage." Plaintiffs made a subcharter to S. for a voyage from Great Isaacs to Hampton Roads for orders, etc., as in the original charter, S. to furnish a full cargo of guano at Great Isaacs. Plaintiffs furnished outward freight, and gave the captain instructions, as soon as discharged, to report to the agent of S., at Nassau, for instructions. The captain so reported, but there not being a full cargo for the brig at Great Isaacs, said agent offered to furnish a cargo at Nassau direct for New York. The captain refused, unless paid $400 in gold, stating, if this was not paid, he would go to Great Isaacs, and thence home in ballast. The agent thereupon entered into an agreement with the captain agreeing to pay the $400, in addition to the original charter, for nonfulfillment of the charter-party, the brig to load with a full cargo for New York. It was so loaded and returned; the $400 was paid, and was paid over by the captain to defendant. Plaintiffs paid to defendant the whole charter-money stipulated, and received from S. the charter-money stipulated to be paid by the subcharter. In an action to recover the $400, *held*, that as it was not received as damages to plaintiffs for breach of the subcharter, or for a waiver of any of their rights, but, in consideration of a deviation in the voyage stipulated by the original charter, the sum was received by the master, not as agent for plaintiffs, but for the owner, and so it belonged to defendant; that the master was bound to represent the interests of plain-

tiffs only in respect to the receipt of cargo, etc., within the terms of their charter, and, simply, so to act as to enable him to earn the subcharter-money, which he did; he was not bound to perform a different voyage for plaintiffs' benefit. *Moss* v. *Husted*. 539

CHATTEL MORTGAGE.

—— *Payment or tender of fees necessary to entitle party to filing of.*
See People ex rel. v. *Hayt* (Mem.), 606.

CODE OF PROCEDURE.

§ 11. *See In re Whittlesey* v. *Hoguet* 358
§ 174. *See Dinsmore* v. *Adams*. (Mem.) 618
§§ 268, 330. *See Godfrey* v. *Moser*. 250
§ 304. *See Powers* v. *Gross* (Mem.) 646

COMMISSIONERS (OF HIGHWAYS).

—— *Constructing embankments, not liable for injuries to adjoining lands.*
See Gould v. *Booth*, 62.

COMMISSIONER OF JURORS (NEW YORK CITY).

1. The office of commissioner of jurors, created by the act of 1847, "in relation to jurors of the city of New York" (chap. 495, Laws of 1847), was not made thereby distinctively a county office, nor did the commissioners succeed to powers theretofore exercised by an officer of the county of New York. *People ex rel. Dunlap.* 162

2. Assuming, however, that it was a county office, it was a new office created by the act; the legislature had power subsequently to change its character from a county to a city office, and to provide for a different mode of appointment. *Id.*

COMMISSIONERS (RAILROAD).

—— *Sureties on bond of, not liable for defalcation during prior term, and declarations not conclusive against sureties.*
See Bissell v. *Saxton*, 52.

COMMITMENT.

—— *For contempt, validity of.*
See People ex rel. v. *Jacobs*, 8.

COMMON CARRIER.

The fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car, nor does it free the company from its duty to render to him, as a passenger, due care. It is the duty of a carrier of passengers to observe the same care to a drunken as to a sober passenger. *Milliman* v. *N. Y. C. and H. R. R. R. Co.* 642

COMMON SCHOOLS.

1. The system of audits and payments of accounts, provided by the act of 1873, reorganizing the government of the city of New York (chap. 335, Laws of 1873), applies to all payments from the city treasury, including payments from school moneys upon contracts of the board of education; the system provided for by the act of 1851, in relation to the common schools of said city (chap. 386, Laws of 1851), also remains in force. *See Dannat* v. *The Mayor*. 585

2. To obtain payment upon such a contract, therefore, the board of education must give its draft on the city chamberlain, as prescribed in the act of 1851, which must be delivered by the payee to the finance department, as his voucher, and all the steps to final payment must be taken, as are required of other claims against the city treasury, by the act of 1873. An action can only be sustained against the city after these steps have been

taken, and only in case of default on its part in omitting to discharge some duty imposed upon it by statute. *Id.*

COMPLAINT.

See PLEADINGS.

COMPTROLLER'S DEED.

—— *Title acquired under.*
See Becker v. *Howard*, 5.

CONSIDERATION.

—— *Payment of one undisputed claim no consideration for agreement to relinquish another claim.*
See Miller v. *Coates* (Mem.), 609.

CONSTITUTIONAL LAW.

1. The provision of the act of 1873, "to reorganize the local government of the city of New York" (chap. 335, Laws of 1873), vesting the power of appointment of commissioner of jurors in the mayor and common council, which made the office distinctively a city one, whatever had been its previous character, is embraced in the subject expressed in the title of the act, and so not in conflict with section 16 of article 3 of the State Constitution; and an appointment to the office in accordance with the provisions of said act of 1873 is valid. *People ex rel.* v. *Dunlap*. 162.

2. The legislature has authority to confer upon the Marine Court of the city of New York whatever civil or criminal jurisdiction it deems best, subject only to the restriction that its character as a local court shall be preserved. (Const., art. 6, § 19.) *Anderson* v. *Reilly*. 189

3. It may confer jurisdiction in actions of assault and battery, without limit as to the amount of the claim or recovery. *Id.*

4. The provision of the Marine Court act of 1872 (§ 3, sub. 12, chap. 629, Laws of 1872) providing that any court of record in the city and county of New York shall have power to send any action of assault and battery, etc., brought therein, to the Marine Court for trial, and giving the Marine Court jurisdiction of such action, as comprehensive as that of the court transferring it, although ineffectual to authorize a compulsory transfer, yet may have effect where the parties consent thereto, and the act may be read as if this condition were inserted. *Id.*

5. The legislature has power to confirm an irregular election, and to ratify title of citizen to office. *People* v. *Flanagan*. 237

6. The question whether the use for which private property is sought to be taken, under and by the exercise of the right of eminent domain, is public or private, is a judicial one, to be determined by the courts; the grant by the legislature of the right to take, is not conclusive evidence that the use is a public one. *In re D. C. Ass'n*. 569

7. The use of lands for the purposes of rural cemetery associations, incorporated under the general law (chap. 133, Laws of 1847, as amended by chap. 280, Laws of 1852, and chap. 245, Laws of 1874), is private, not public. *Id.*

8. The provision, therefore, of the act of 1873 (chap. 452, Laws of 1873), authorizing the taking of lands for the purposes of such an association, by proceeding *in invitum*, is unconstitutional and void. *Id.*

CONSTRUCTION.

In an action against sureties upon a bond given by an agent for the faithful performance of his duties, the surrounding circumstances and the situation of the parties, at the time of its execution, may be considered in construing its terms, in case of ambiguity therein. *W. N. Y. L. Ins. Co.* v. *Clinton*. 326

CONTEMPT

1. In proceedings under the statute for contempt (2 R. S., 534, *et seq.*), the court has jurisdiction to determine the amount of costs and expenses to be imposed as a fine in case the party is adjudged in contempt, and if items are included which ought not properly to be allowed, this is not an excess of jurisdiction and does not render the commitment void. *People ex rel.* v. *Jacobs.* 8

2. The action of the court, therefore, cannot in such case be reviewed on *habeas corpus.* *Id.*

3. A court of a justice of the peace has no power to adjudge a person in contempt and to punish him therefor, save in the cases prescribed by statute. (ANDREWS and MILLER, JJ., dissenting.) *Rutherford* v. *Holmes.* 368

4. In order to give such court jurisdiction to punish a witness for contempt for refusing to answer a proper and pertinent question, there must be an oath of the party, at whose instance he attended, of the materiality of the testimony (2 R. S., 274, § 279), and a justice is liable in an action for false imprisonment, at the suit of one imprisoned under and in pursuance of his warrant of commitment for such a contempt, where it does not appear in the warrant or by the evidence that such an oath was made. (ANDREWS and MILLER., JJ., dissenting.) *Id.*

5. It is immaterial that the witness was a party sworn in his own behalf; that the question he refused to answer was asked upon cross-examination, and that it was therefore impossible to meet the requirements of the statute; this does not authorize a disregard of it. (ANDREWS and MILLER, JJ., dissenting.) *Id.*

6. *It seems* that in case of such refusal to answer, the remedy of the opposite party is to move to strike out the direct-examination. *Id.*

CONTRACT.

1. One D. contracted with defendant to unload from vessels on to cars all the railroad iron brought to the dock at A. for a specified time and for a specified price, defendant to furnish a derrick to be used for the purpose. Defendant furnished a derrick suitable and safe at the time for use. Plaintiff was employed by D. to assist and was injured by a fall of the derrick. In an action to recover damages for the injury, *held*, that if D. was chargeable with negligence in omitting to inspect and repair the derrick, defendant was not responsible therefor; that in the absence of a contract to that effect no duty on the part of defendant to keep the derrick in repair could be implied; that the rule requiring a master to furnish safe and suitable machinery for the use of his servants did not apply, as plaintiff was not the servant of defendant; and that therefore a charge that in the absence of a special agreement defendant was bound to keep the derrick in repair, was error. *King* v. *N. Y. C. and H. R. R. R. Co.* 181

2. Defendant's evidence tended to show that it was to make repairs when notified by D. that repairs were necessary. The court charged that if this were so and no notice was given, if the agreement was not known to plaintiff and the accident occurred from neglect to repair without negligence on the part of plaintiff, defendant was liable. *Held*, error. *Id.*

3. Plaintiff and defendants being the joint owners of certain letters patent, which they believed to be valid, entered into an agreement that defendants should have the exclusive right to manufacture the patented article, they paying to plaintiff a specified sum as royalty on each article manufactured. In an action to recover the royalty, *held*, that the invalidity of the patent was not a defence for the time the defendants enjoyed the use of the patent unmolested under the license. *Marston* v. *Swett.* 206

4. *It seems*, that, had there been no patent, and defendants had agreed to pay the sum stipulated in consideration that plaintiff, during a given period, would not engage in the manufacture, there would have been a sufficient consideration to uphold the agreement. *Id.*

5. The terms of a contract which will exempt a railroad corporation from liability for negligence must be clear and unmistakable. *Blair* v. *E. R. Co.* 313

6. Defendant entered into a contract with the United States Express Company, in 1858, for the transportation of freight, by which it agreed, among other things, to transport, free of charge, the money-safes, contents and messengers of the express company, it "assuming no liability whatsoever in the matter." In 1871 another contract was made, by its terms, adopting the conditions of the former contract, save as modified. It provided that defendant should assume the usual risks taken by railroads as to freight, except that it "shall not assume any risk or loss on any money, bank-notes, bonds, gold, bullion or jewelry packages, and for which, with the express company's safes and messengers, no charge for carriage is to be made." In an action for the alleged negligent killing of an express messenger, *held* (EARL, J., dissenting), that the clause referred to in the contract of 1858 was abrogated by that of 1871; also that reading them both together there was no exemption of defendant from liability. *Id.*

7. A company had been organized, composed of individuals owning oil lands, under the name of the E. P. Co., and all of its stock subscribed for. It was the intention to have it incorporated on the basis of the property so held, but before this was done defendant, who was a subscriber to the stock, agreed with plaintiff that if the latter would pay to the treasurer $500 he would see that plaintiff had a half share of the stock. Plaintiff paid the money, which was credited to defendant. A corporation was subsequently duly incorporated identical as to shareholders and property, but named the R. F. P. Co. No stock was transferred to plaintiff and no demand therefor was made by him. The R. F. P. Co. becoming embarrassed its property was, by direction of the directors, sold at auction and bid in by H. for the benefit of the stockholders. Defendant paid his proportion of the sum bid. In an action to recover the $500, *held*, that, to put defendant in default, a demand by plaintiff of the stock was requisite, or proof given that it was out of defendant's power to transfer it; that defendant's contract would have been performed by a transfer of stock in the corporation succeeding to the property of the E. P. Co.; and that a transfer by defendant to plaintiff of an interest in the property held by H. in trust, equal to the interest defendant contracted to convey, would have satisfied any equitable claim of plaintiff and have been a legal performance of the contract. *Weller* v. *Tuthill.* 347

8. Plaintiff, being the owner of letters patent for an improvement in harvesting machines, known as "Marsh's self-rake," entered into a written agreement with defendants by which he licensed them to make, use and vend the invention within a specified territory, they agreeing to pay a royalty of ten dollars on each one of the patented articles made and sold by them or by their authority or procurement. Defendants were succeeded in business by a corporation, to whom they sold their entire stock, including the "self-rakes," finished, on hand and in the hands of agents, and a large number in process of manufacture; also the good will of the business. The corporation finished and sold the unfinished rakes; one of the defendants was its president and managing agent. *Held*, that defendants were chargeable with the royalty thereon, as they were made and sold by their authority and procurement. *Marsh* v. *Dodge.* 533

See BUILDING CONTRACTS.
CHARTER PARTY.
—— *As to acceptance of bill of exchange, and delivery of bill of lading securing it, construed.*
See Magoun v. *Sinclair*, 80.
—— *Measure of damages for breach of.*
See Parsons v. *Sutton*, 92.
—— *Payment of undisputed claim no consideration for agreement to relinquish another claim.*
See Williams v. *Coates* (Mem.), 609.

CONTRIBUTION.

1. The right to contribution between co-sureties depends upon principles of equity rather than upon contract. The equity does not arise from the fact simply that both parties are sureties. They must stand in the same relation to the principal and without equities between themselves, giving one an advantage over the other. *Wells* v. *Miller*. 255

2. It is competent to prove by parol the relation of the parties, and any extrinsic facts affecting the equities. *Id.*

3. Plaintiff and B. were copartners, the latter being the managing partner, which was known to defendant, he having done considerble business with the firm. B. negotiated a loan for his individual benefit from one C. to be made upon a satisfactory note. He drew a note for the amount to which he signed the firm name, and defendant, at his request, signed as surety, supposing it to be for the benefit of the firm. C. objected to the note because it was signed in the firm name, and requested one signed by the members individually. A new note was drawn signed by B., and by plaintiff, without adding the word "surety" to his name, and then by defendant. Plaintiff did not know of the making of the first note until the second note was presented to him for signature, when he was informed of it and was told the reason of the change, and that defendant would sign the second note. In an action to enforce contribution, *held*, that plaintiff, although having no affirmative knowledge, was bound to presume ignorance on the part of defendant of the character of the first note from its form and the manner of signing it, and also to presume that B. would inform him when he was applied to for his signature to the second note, of a reason why a change was desired; that he impliedly authorized B. to continue the deception by not requesting him to inform defendants of the character of the loan or affixing "surety" to his name; and that, therefore, plaintiff knowing facts charging him with knowledge that defendant signed, and intended to sign as surety for him, and by silence and implied authority having contributed to induce him to again sign in the same character, he was not entitled to contribution. *Id.*

—— *Between accommodation indorsers.*
See Easterly v. *Barber*, 433.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVERSION.

1. Plaintiff, in August, 1866, stored in defendants' warehouse a lot of wines, and another lot in November, 1868, with the understanding that defendants were to purchase them. In February, 1870, defendants having declined to give a definite answer as to whether they would purchase, plaintiff, with a view of bringing them to a determination, rendered bills dated respectively at the dates when the wines were placed in defendants' custody. The bills were not assented to by defendants, and no agreement was made as to price and terms of sale. In July, 1870, plaintiff sent to defendants a statement of the wines, crediting thereon, "by amounts received on account, $32,272.63." Defendants

failed in November, 1870, having, prior to that time, disposed of the wines. In an action for conversion, after defendants, for the purpose of showing a sale, had given in evidence the statement of July, 1870, plaintiff offered to prove facts tending to show that the credit was not for payments made specifically, on account of the alleged purchase, but for moneys due defendants from plaintiff in other transactions, which the latter were willing to offset. This evidence was excluded and plaintiff nonsuited. *Held* (CHURCH, Ch. J., dissenting), error; that the evidence was proper and material, as destroying the effect of the credit as an admission of a consummated sale; and that this being explained, the evidence was sufficient to entitle plaintiff to go to the jury on that question. *Richard* v. *Wellington.* 308

2. The relation of broker and customer, under the ordinary contract for a speculative purchase of stock, is that of pledgee and pledgor. (ALLEN and RAPALLO, JJ., dissenting.) *Baker* v. *Drake.* 518

3. A sale of the stock by the broker under such contract, without notice to the customer of the time and place of sale, is a conversion. (ALLEN and RAPALLO, JJ., dissenting.) *Id.*

4. Plaintiff employed defendants to purchase stocks for him upon margin, he agreeing that all transactions in stocks should be in every way subject to the usages of defendants' office. In an action for a conversion, by an alleged sale without notice, of stocks purchased, defendants offered to prove that it was the custom of their office to sell on account of failure to furnish sufficient margin at the stock exchange without giving notice to the customer of the time and place of sale. This offer was rejected. *Held* (CHURCH, Ch. J., ANDREWS and MILLER, JJ., dissenting), error. *Id.*

5. Upon the question of damages the court charged the jury, in substance, that if the right of action was established, plaintiff was entitled to recover what it would have cost him to replace the stocks on a day within a reasonable time after the sale, deducting the sum due to the defendants. *Held*, no error. *Id.*

—— *Sufficiency of evidence to sustain action for.*

See A. M. Co. v. *Kessler* (Mem.), 637.

CONVERSION (EQUITABLE).

See EQUITABLE CONVERSION.

CORPORATIONS.

1. The provisions of the statute authorizing summary proceedings by a landlord to dispossess a tenant for non-payment of rent (2 R. S., 512, § 28, as amended, chap. 828, Laws of 1868) apply to and include proceedings against corporate bodies as well as individuals. *Brown* v. *The Mayor.* 385

2. While a corporation cannot, under a power to take lands for a public use, take from another corporation having the like power lands held by the latter for a public use pursuant to its charter, yet an easement may be acquired, *in invitum*, in such lands when it may be enjoyed without detriment to the public or without interfering with the use to which the lands are devoted. *In re R. W. Comrs.* 413

3. So, also, lands held by a corporation or public body, but not used for or necessary to a public purpose, may be taken as if held by an individual owner. *Id.*

See CEMETERY ASSOCIATIONS.
EXPRESS COMPANIES.
INSURANCE (ACCIDENTAL).
INSURANCE (FIRE).
INSURANCE (LIFE.)
INSURANCE (MARINE).
MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
RELIGIOUS CORPORATIONS.

COSTS.

1. A plaintiff in an action, the subject-matter of which is within the jurisdiction of a court of a justice of the peace, cannot, by merely demanding judgment for a sum exceeding the jurisdiction of that court, oust it of jurisdiction, and thereby entitle himself to full costs in a superior court wherein he brings the action upon a recovery of a nominal sum; the recovery is conclusive of the amount in controversy, as affecting the question of costs. *Powers* v. *Gross.* 646

2. Accordingly *held*, where plaintiff, in an action in the Supreme Court for the conversion of property, demanded judgment for $500, but recovered only thirty-five dollars, that defendant was entitled to costs. *Id.*

—— *As a fine in proceedings to punish for contempt.*
See People ex rel. v. *Jacobs*, 8.

COUNTER-CLAIM.

In an action upon a contract, defendant has a right to set up as a counter-claim any cause of action arising upon another contract existing in his favor against plaintiff at the commencement of the action. *Parsons* v. *Sutton.* 92

COUNTIES.

See RENSSELAER COUNTY.

COURTS.

See COURTS OF OYER AND TERMINER.
DISTRICT COURTS (NEW YORK CITY).
GENERAL TERM.
JUSTICE'S COURT.
MARINE COURT (NEW YORK CITY).
SURROGATE'S COURT.

COURTS OF OYER AND TERMINER.

1. The power of a sheriff in the selection of attendants upon courts of Oyer and Terminer is limited by the statute (2 R. S., 289, § 83) to a selection from two classes of existing officers, viz., constables and marshals. He is not authorized to select persons who are neither for that service; and compensation is only provided for those who, being constables or marshals, attend the courts on the summons of the sheriff. *Day* v. *The Mayor.* 592

2. Accordingly, *held*, that one, who was not at the time either constable or marshal, appointed by the sheriff of the city and county of New York "a special deputy sheriff to assist in preserving the public peace, to attend the Court of Oyer and Terminer," could not receive compensation for his attendance upon said court under such appointment. *Id.*

3. The present marshals in the city of New York answer the description of officers who may be summoned by the sheriff. *Id.*

COVENANT.

In pursuance of a contract made, November 5, 1870, plaintiff, deeded to defendant certain premises in the city of New York, December 5, 1870, with a covenant that they were free from all *charges* assessments and incumbrances. An assessment against plaintiff upon the premises for a street improvement, was confirmed by the board of revision and correction of assessments, November 7, 1870, but the title of the assessment was not entered in the title-book of assessments, in the bureau of arrears, until December twenty-fourth. In an action to recover the assessment, *held* (RAPALLO, J., dissenting), that the provisions of the acts relating to the collection of arrears of assessments, etc., in the city of New York (§ 6, chap. 579, Laws of 1853; § 1, chap. 381, Laws of 1871), declaring that no

assessment shall be deemed to be confirmed so as to be a lien on property included in it, until the title shall be entered in said title book as prescribed, did not affect plaintiff's liability under the covenant; that the assessment was fairly embraced in its terms; and that plaintiff was bound to pay the same. *DePeyster* v. *Murphy*. 622

CRIMINAL TRIAL.

A court, in imposing sentence, may take into consideration the time the convict has been in custody awaiting trial, but it is matter of discretion only. *People ex rel.* v. *The Warden*. 342

CUSTOM.

—— *As effecting policies of Marine Insurance.*

See Mc Coll v. *S. M. Ins. Co.*, 505.

—— *Of brokers, when evidence of competent, in action against brought for unlawful conversion of stock pledged.*

See Baker v. *Drake*, 518.

DAMAGES.

1. In an action to recover damages for negligently causing the death of another, the Northampton tables are competent evidence to show the probable duration of life of the deceased, which is an element in estimating damages. *Sauter* v. *N. Y. C. and H. R. R. R. Co.* 50

2. The measure of damages for breach of a contract to sell and deliver an article of merchandise at a time and place specified, when the purchaser can go into the market and buy the article, is limited to the difference in value between the contract-price and the market-price at the time and place of delivery. *Parsons* v. *Sutton*. 92

3. If there is no market, and the article cannot be had there with reasonable diligence, and the vendee has suffered special damages because of, and which are the proximate and natural results of, the vendor's failure, such damages may be recovered. *Id.*

4. The special damage in such case must be alleged and set forth in the pleadings of the party. *Id.*

5. Plaintiffs contracted to deliver to defendants, by June 2, 1872, a quantity of "plate paper," to print a frontispiece for the July number of a periodical published by defendants. Plaintiffs did not deliver the paper at the time, but had it ready to deliver June eighth, and so notified defendants. Defendants had countermanded the order on the seventh, and refused to accept the paper. In an action for other goods sold and delivered, defendants set up the breach of the contract as a counter-claim, alleging that they were unable to print the frontispiece because of the breach, and claiming special damages for the loss of sales and of subscriptions to the periodical, in consequence. Defendants proved that, a day or two after June second, they went to dealers, but could not find similar paper; there was no proof that such paper could not usually be found in the market, or that it could not be manufactured in time, or that defendants could not find paper answering, substantially, the purpose, or that the paper, when ready to be delivered, would not have been as useful as when called for by the contract. *Held*, that defendants were not entitled to special damages; that while they had the right to refuse to accept the paper after the contract time, they could not so refuse and then claim special damage because of inability to procure it. *Id.*

—— *When market-price at place other than where property is contracted to be delivered is proper, on question of damages.*

See Rice v. *Manley*, 82.

—— *In action for conversion by broker of stock pledged, measure of.*

See Baker v. *Drake*, 518.

—— *In action against trustee who has purchased property in violation of duty.*
See Fulton v. *Whitney*, 548.
—— *In action for fraudulent representation on sale of note, costs in attempting to collect, not proper item of.*
See Slingerland v. *Bennet* (Mem.), 611

DAYS OF GRACE.

—— *Detached coupons of railroad bonds payable to bearer at specified time and place, entitled to.*
See Everitson v. *Nat. Bk. of N.*, 14

DEBTOR AND CREDITOR.

1. The delivery by a debtor to a creditor of a promissory note of a third person, as collateral security for, or as conditional payment, in part, of his debt, is equally an acknowledgment of liability for the whole debt, as would be an absolute payment, and is equally effectual to suspend the operation of the statute of limitations. *Smith* v. *Ryan*. 352

2. It is, however, only evidence of an acknowledgment and promise to pay at the time of the delivery of the note, not at the time of its maturity or when it is paid by the maker; the latter is not constituted agent of the debtor to renew the promise by payment, whether made at maturity or afterwards, and the statute begins to run from the time of the delivery. *Id.*

3. A transfer by a debtor of all his property, real and personal, without consideration and in trust for him and for his benefit during his life, and after his death for the payment of his debts, etc., is, *per se*, conclusive evidence of fraud as to existing creditors; no extrinsic circumstances or evidence *aliunde* is necessary to establish a fraudulent intent. It is void, therefore, as against such creditors both as to the real and the personal estate. *Young* v. *Heermans*. 374

4. The innocence of any fraudulent intent, upon the part of the transferee, will not protect his title. *Id.*

5. Where, at the time of such a transfer, the transferrer has in his hands, as agent for another, securities belonging to his principal for which he is liable to account, although no demand has been made upon him to transfer and surrender the securities, yet there is a fiduciary and pecuniary obligation, and a contingent liability which makes the principal a creditor, within the meaning of the statute, against fraudulent conveyances. (2 R. S., 135, § 1; 137, § 1.) *Id.*

6. It is not necessary for the principal, in order to impeach the transfer for fraud, to show that his agent actually intended at the time a misappropriation or conversion of the securities. *Id.*

7. The firm of V. & B. consigned their goods to the firm of H., S. & Co., commission merchants, for sale. V. agreed with H., S. & Co. to secure advances made to his firm by keeping on deposit with them funds sufficient for that purpose. He had then standing to his individual credit $50,000. He thereafter drew drafts and made deposits, and statements of the account were made to him from time to time, in which he was allowed interest on the credits and charged interest on the debits. V. & B. received advances at times larger than the balance due V. H., S. & Co. suspended, owing V. $18,545.26. V. & B.'s account was closed and any balance paid. A receiver was appointed of the property of H., S. & Co. V. moved that the receiver be required to pay him the balance so due, on the ground that it was a special deposit in the hands of the receiver. *Held*, that the motion was properly denied; that the receiver had no property which belonged to V., or upon which he had a legal or equitable lien; and that he was simply a creditor of the insolvent firm with no more right to the specific amount of his claim

than any other creditor. *Butler* v. *Sprague.* 392

8. Also *held,* that even if V. had shown that he made a special deposit, he could only recover it in case he found the same money in the hands of the receiver, or property in which it had been wrongfully invested or which had been wrongfully substituted for it; that if wrongfully converted by H., S. & Co. the only claim of V. against the insolvent estate was that of a creditor. *Id.*

DEDICATION.

1. Where the owner of land lays the same out into lots and streets, makes and files a map or plot thereof, and sells and conveys lots by the map bounded upon the streets, as delineated thereon, this does not necessarily, and without other facts, make the streets so laid out public highways. *N. F. S. B. Co.* v. *Bachman.* 261

2. To constitute a public highway by dedication, there must not only be a setting apart and a surrender to the public use of the land by the owner, but, also, an acceptance and formal opening by the proper authorities, or a user. *Id.*

DEED.

1. N. granted to defendant U. "all the water that will run through a lead pipe with a three-eighths of an inch bore from a spring or well," on the premises of the grantor, with the privilege of conveying the water in a lead or wooden pipe from the spring to a public highway. *Held,* that the reference to the size of the pipe was not simply as a measure of the water granted, but that defendant was restricted to the use of a pipe with a bore of three-eighths of an inch, all the way from the spring to the highway; and, it appearing that although the water was taken from the spring through a short piece of lead pipe of the size specified, then through a larger pipe to the highway, and was discharged through a faucet but two-eighths of an inch in diameter, more water was drawn than would run through a pipe of the uniform size of three-eighths of an inch, that an action could be maintained, restraining defendants from using a larger pipe for any portion of the distance. *Markham* v. *Stowe.* 574

—— *Comptroller's, title acquired under.*

See Becker v. *Howard,* 5.

—— *Covenant in, against charges and incumbrances, when it includes an assessment*

See De Peyster v. *Murphy,* 622.

DEFAULT.

1. Where a motion to vacate a judgment taken by default is made both on the ground of mistake, inadvertence, surprise or excusable neglect, and also on the ground of fraud, and the facts warrant the granting of the motion on that ground, it will be presumed, on appeal from an order of General Term, affirming an order granting the motion, as against an objection, that the order was granted more than a year after notice of judgment, and so was improper under section 174 of the Code; that the order was granted on the ground of fraud, and the limitation of said section does not apply. *Dinsmore* v. *Adams.* 618

2. Such an order is not reviewable here. *Id.*

—— *Judgment taken by, against infant; when action to set aside maintainable.*

See McMurray v. *McMurray,* 175.

—— *Judgment taken by, conclusiveness of.*

See Brown v. *The Mayor,* 385

DEFENCES.

1. In an action upon a contract required by the statute of frauds to be in writing it is not necessary to allege in the complaint that it is in

writing. For the purposes of the complaint this will be presumed, and unless the contract is denied in the answer or alleged to be void because not in writing, the statute furnishes no defence. *Marston* v. *Swett.* 206

2. Plaintiff and defendants being the joint owners of certain letters patent, which they believed to be valid, entered into an agreement that defendants should have the exclusive right to manufacture the patented article, they paying to plaintiff a specified sum as royalty on each article manufactured. In an action to recover the royalty, *held*, that the invalidity of the patent was not a defence for the time the defendants enjoyed the use of the patent unmolested under the license. *Id.*

3. *It seems*, that, had there been no patent, and defendants had agreed to pay the sum stipulated in consideration that plaintiff, during a given period, would not engage in the manufacture, there would have been a sufficient consideration to uphold the agreement. *Id.*

4. *Saxton* v. *Dodge* (57 Barb., 84) and the authorities holding that the invalidity of a patent is a valid defence to an action to recover the purchase-price thereof, distinguished. *Id.*

5. As to whether, when a void patent has been sold in good faith and the purchaser has enjoyed the monopoly unmolested during the whole time, and without liability to account to any one claiming a superior right, he could defend an action for the purchase-price, *quære*. *Id.*

6. It is no defence to an action upon a bond, given by an agent for the faithful performance of his duties, that the sureties were ignorant as to the extent of the obligation assumed, or were misled by the principal in reference thereto, in the absence of proof that the obligee was a party to the fraud; it is not the duty of the obligee to seek out the sureties and explain to them the nature and extent of their obligation, but it is for the sureties to ascertain for themselves. *W. N. Y. L. Ins. Co.* v. *Clinton.* 326

DEFINITIONS.

—— *When the word "heirs" can not be construed as "children."*
See Thurber v. *Chambers*, 42.

DELIVERY.

—— *Of bill of lading, effect of.*
See Magoun v. *Sinclair*, 30.

DEMAND.

—— *When necessary to put party in default.*
See Weller v. *Tuthill*, 347.

DEPOSIT.

1. The firm of V. & B. consigned their goods to the firm of H., S. & Co., commission merchants, for sale. V. agreed with H., S. & Co. to secure advances made to his firm by keeping on deposit with them funds sufficient for that purpose. He had then standing to his individual credit $50,000. He thereafter drew drafts and made deposits, and statements of the account were made to him from time to time, in which he was allowed interest on the credits and charged interest on the debits. V. & B. received advances at times larger than the balance due V. H., S. & Co. suspended, owing V. $18,545.26. V. & B.'s account was closed and any balance paid. A receiver was appointed of the property of H., S. & Co. V. moved that the receiver be required to pay him the balance so due, on the ground that it was a special deposit in the hands of the receiver. *Held*, that the motion was properly denied; that the receiver had no property which belonged to V., or upon which he had a legal or equitable lien; and that he was simply a creditor of the insolvent firm with no more right to the specific

amount of his claim than any other creditor. *Butler* v. *Sprague.* 392

2. Also, *held*, that even if V. had shown that he made a special deposit, he could only recover it in case he found the same money in the hands of the receiver, or property in which it had been wrongfully invested or which had been wrongfully substituted for it; that if wrongfully converted by H., S. & Co. the only claim of V. against the insolvent estate was that of a creditor. *Id.*

DEVISE.

—— *Construction of, and when it lapses.*
See Thurber v. *Chambers*, 42.

DISTRICT COURTS (NEW YORK CITY).

——*Election of justice for tenth district.*
See Wheeler v. *Reynolds*, 237.

DRAINAGE.

1. Where commissioners of highway, in constructing an embankment upon a highway, omit to put therein a sufficient culvert to carry off the surface water from adjoining lands, their successors in office are not liable, in a private action at the suit of the owner, for injuries resulting from the accumulation of the water upon said lands caused by the embankment. *Gould* v. *Booth.* 62

2. *It seems*, that commissioners, in grading highways, are not bound to provide a channel for the drainage of surface water, and are not liable for injuries resulting from their omitting so to do. *Id.*

EASEMENTS.

1. While a corporation cannot, under a power to take lands for a public use, take from another corporation having the like power lands held by the latter for a public use pursuant to its charter, yet an easement may be acquired, *in invitum*, in such lands when it may be enjoyed without detriment to the public or without interfering with the use to which the lands are devoted. *In re R. W. Comrs.* 413

2. N. granted to defendant U. "all the water that will run through a lead pipe with a three-eighths of an inch bore from a spring or well" on the premises of the grantor, with the privilege of conveying the water in a lead or wooden pipe from the spring to a public highway. *Held*, that the reference to the size of the pipe was not simply as a measure of the water granted, but that defendant was restricted to the use of a pipe with a bore of three-eighths of an inch, all the way from the spring to the highway; and, it appearing that although the water was taken from the spring through a short piece of lead pipe of the size specified, then through a larger pipe to the highway, and was discharged through a faucet but two-eighths of an inch in diameter, more water was drawn than would run through a pipe of the uniform size of three-eighths of an inch, that an action could be maintained, restraining defendants from using a larger pipe for any portion of the distance. *Markham* v. *Stowe.* 574

ELECTION.

1. Under the provisions of the act of 1873 (chap. 613, Laws of 1873) providing for the annexation of certain towns in Westchester county to the city and county of New York, which, by its terms (§ 18), was to take effect January 1, 1874, except as to parts "otherwise provided for," and which act declares (§ 5), that said towns shall constitute the tenth judicial district, a justice of which shall be elected "at the next general election," the election intended was the next after the passage of the act, *i. e.*, that of November, 1873. *People* v. *Flanagan.* 237

3. The provisions of said act (§§ 1, 2) directing such annexation are within the exception, and such annexation took place at the passage of the act. *Id.*

2 It was also the legislative intent (§ 2) that the election of 1873 should be conducted in accordance with the election laws then operative in the county of Westchester, not in conformity to the law applicable only to the city of New York. *Id.*

4. Accordingly, *held*, that a justice elected for said district at the general election in 1873, under the laws operative in said county of Westchester, and without regard to the registry acts applicable to the city, was regularly elected and entitled to the office. *Id.*

5. Also *held*, that the act of 1874 (chap. 329, Laws of 1874) re-enacting and amending said act of 1873, was intended, and operated, as a confirmation of such election, even if conducted irregularly. *Id.*

EMINENT DOMAIN.

1. Under the general railroad act the question as to the necessity of the appropriation of lands for the use of a railroad corporation is a judicial one for the court to determine; and when controverted the facts must, in some form, be presented to the court to enable it to decide. *In re N. Y. C. R. R. Co.* 407

2. Where a railroad corporation makes application to acquire land in addition to that which it is entitled to take for its roadway, and objections are made by the owner, coupled with a denial of the special allegations of the petition respecting the purposes for which the land is required, the burden is upon the petitioner of adducing proof of the special circumstances alleged in support of the averment that it requires the land. *Id.*

3. The provision of the general railroad act (§ 15, chap. 140, Laws of 1850, as amended by § 2, chap. 282, Laws of 1854), authorizing the land owner to disprove the allegations of the petition was intended to enable him to introduce proof upon his part to meet that offered by the petitioner, and to disprove allegations of the petition capable of being disproved; as to the special circumstances lying within the knowledge of the petitioner it is put to its proofs, if the owner show sufficient cause against the petition. *Id.*

4. While a corporation cannot, under a power to take lands for a public use, take from another corporation having the like power lands held by the latter for a public use pursuant to its charter, yet an easement may be acquired *in invitum*, in such lands when it may be enjoyed without detriment to the public or without interfering with the use to which the lands are devoted. *In re R. W. Comrs.* 413

5. So, also, lands held by a corporation or public body, but not used for or necessary to a public purpose, may be taken as if held by an individual owner. *Id.*

6. The R. W. Co. was incorporated for the purpose of supplying the city of R. with water. It owned lands on the margin of H. lake, and claimed to own, as riparian proprietor, the waters of said lake. The water commissioners of the city of R., under statutes authorizing the city to acquire by proceedings, *in invitum*, easements in lands for the purpose of procuring a water supply for the city, instituted such proceedings to acquire a right to dig a trench across certain specified lands of the R. W. Co. to the lake, and to lay a pipe therein for the purpose of carrying the water of the lake to the city. *Held*, that the rights of the respective parties to the water of the lake were not involved in the proceedings, nor did the petition or orders granted, in pursuance thereof, seek to confer upon the city any right to take or use the water, or to do any act to the detriment of a riparian proprietor

that all that could be, or was sought to be, acquired thereunder was an easement of laying pipes and conveying through them any water to which the city had a right; that, therefore, the granting of the petition was not an interference with the corporate rights and franchises of the R. W. Co., or with the use of the lands for the purposes of its organization. *Id.*

7. The question whether the use for which private property is sought to be taken, under and by the exercise of the right of eminent domain, is public or private, is a judicial one, to be determined by the courts; the grant by the legislature of the right to take, is not conclusive evidence that the use is a public one. *In re D. C. Ass'n.* 569

8. The use of lands for the purposes of rural cemetery associations, incorporated under the general law (chap. 133, Laws of 1847, as amended by chap. 280, Laws of 1852, and chap. 245, Laws of 1874), is private, not public. *Id.*

9. The provision, therefore, of the act of 1873 (chap. 452, Laws of 1873), authorizing the taking of lands for the purposes of such an association, by proceeding *in invitum*, is unconstitutional and void. *Id.*

EQUITABLE CONVERSION.

1. The will of H. directed his executors to close his business and place the proceeds thereof and all his "property, both real and personal, at interest on bond and mortgage, or otherwise, as in their judgment they may deem best," and to employ "the proceeds, *rents*, income or interest" for the support and maintenance of the testator's wife and children; he then devised and bequeathed all his estate, "both real and personal," to his children, to be divided upon the death of his wife. In an action for a construction of the will, *held*, that an intent to convert absolutely the real estate into money did not appear, and no such conversion was made by the will. *Gourley* v. *Campbell.* 169

2. It appeared that the personal estate of the testator was amply sufficient to provide for the support and maintenance of the testator's widow and children. The real estate was not disposed of by the executors. *Held*, that as no necessity existed for a sale of the realty for the purpose specified in the will, to this extent the purpose had failed; and that the land retained its original character and descended to the heirs. *Id.*

3. The will of B. directed his executrix to divide his real estate equally between his two sons C. and S., after the youngest arrived at the age of twenty-three. In a codicil he directed his executrix to sell all his real estate. Both sons survived the testator. In an action for a construction of the will, *held*, that there being no purpose for the sale expressed in the codicil, the fair inference was it was for the purpose of division; that as the sons survived, the purpose had not failed; and that the direction to sell operated as a conversion of the real estate into personalty immediately upon the death of the testator and the land became money for all purposes of administration, the sons taking their interest as legatees; and that upon the death of C. before actual sale, his interest passed to his personal representatives. *Fisher* v. *Banta.* 468

4. Also, *held*, that conversion was not prevented because the legal estate was not given in trust to the executrix, or because there was no devise of the lands, and they passed by descent to the two sons. *Id.*

EQUITY.

1. Where, in an action to set aside conveyances of real estate as obtained by fraud, an interlocutory judgment has been rendered determining the title to be in plaintiff, subject to certain liens of defendant, and directing an accounting, and where, by consent, a receiver

has been appointed to receive the rents during the accounting, it is within the discretion of the court to order the receiver to pay over the rents collected to the plaintiff upon such terms as it may deem proper. *Platt* v. *Platt.* 360

——*Action to set aside judgment for fraud, when maintainable.*

See McMurray v. *McMurray*, 175.

——*Where court of equity has jurisdiction to enforce performance of partially performed parol contract to convey lands, or to declare the purchaser a trustee ex maleficio.*

See Wheeler v. *Seymour*, 227.

——*Action to recover moneys paid by mistake equitable, and evidence showing equities with defendant proper without being pleaded.*

See K. Bk. v. *Eltinge* (Mem.), 625.

ESTOPPEL.

Plaintiffs contracted to sell to B. & Co. a quantity of cotton, in store, to be paid for on delivery. The N. Y. W. & S. Co. loaned to B. & Co. a sum of money, receiving as security an invoice and written pledge of the cotton, and an order upon the warehouseman. Upon presentation of the order, and while the cotton was being weighed and examined for delivery, the warehouseman, with the consent of plaintiffs, gave to the N. Y. W. and S. Co. the ordinary warehouse receipt for the cotton. This was on Saturday. B. & Co. did not pay for the cotton, and on the next Tuesday failed. In an action to recover possession of the cotton, *held*, that, upon the occasion of the loan to B. & Co., the N. Y. W. and S. Co. acquired no title to the cotton, as against plaintiffs, as it parted with its money solely upon the engagement of that firm, and upon their order; that no title was acquired at the time of the delivery of the warehouse receipt as no value was parted with upon the faith of it; but that, upon receiving the receipt, said company had a right to repose upon it as a ratification of the prior pledge, and having relied upon it, and thereby having been induced to refrain from any attempt to recover the loan or secure an indemnity, plaintiffs were estopped from claiming title. *Voorhis* v. *Olmstead.* 118

EVIDENCE.

1. In an action to recover damages for negligently causing the death of another, the Northampton tables are competent evidence to show the probable duration of life of the deceased, which is an element in estimating damages. *Sarter* v. *N. Y. C. and H. R. R R. Co.* 50

2. In an action upon a bond of an officer, his official reports are not conclusive as against his sureties, but mere admissions of the principal, subject to explanation. *Bissell* v. *Saxton.* 55

3. So, also, statements made by the principal upon applying for a reappointment are not conclusive against the sureties. *Id.*

4. A judgment record in a former action between the parties, although not pleaded in bar, is competent to prove a material fact at issue. *Marston* v. *Swett.* 206

5. Plaintiff, in August, 1866, stored in defendants' warehouse a lot of wines, and another lot in November, 1868, with the understanding that defendants were to purchase them. In February, 1870, defendants having declined to give a definite answer as to whether they would purchase, plaintiff, with a view of bringing them to a determination, rendered bills dated respectively at the dates when the wines were placed in defendants' custody. The bills were not assented to by defendants, and no agreement was made as to price and terms of sale. In July, 1870, plaintiff sent to defendants a statement of the wines, crediting thereon, "by amounts received on account, $32,272.63." Defendants failed in November, 1870, having, prior to that time, disposed of the wines. In an action for conversion, after defendants, for the purpose of showing

a sale, had given in evidence the statement of July, 1870, plaintiff offered to prove facts tending to show that the credit was not for payments made specifically, on account of the alleged purchase, but for moneys due defendants from plaintiff in other transactions, which the latter were willing to offset. This evidence was excluded and plaintiff nonsuited. *Held* (CHURCH, Ch. J., dissenting), error; that the evidence was proper and material, as destroying the effect of the credit as an admission of a consummated sale; and that this being explained, the evidence was sufficient to entitle plaintiff to go to the jury on that question. *Richard* v. *Wellington*. 308

6. A judgment taken by default in summary proceedings for non-payment of rent, until reversed, set aside or vacated, is conclusive in an action by the landlord against the tenant to recover the rent, of the facts alleged in the affidavit, and which are required by the statute to be alleged as the basis of the proceedings, to wit: the tenancy, the occupation by the tenant, the non-payment of rent due, and the holding over after default in payment. *Brown* v. *The Mayor*. 385

7. In an action by an indorser of a promissory note, who has paid the same, against a prior indorser, it is competent for defendant to prove by parol that all the indorsers were accommodation indorsers, and by agreement they were, as between themselves, co-sureties. *Easterly* v. *Barber*. 433

8. The complaint in this action alleged, in substance, that plaintiff, being the owner of letters patent for an improvement in harvesting machines, known as "Marsh's self-rake," entered into a written agreement with defendants by which he licensed them to make, use and vend the invention within a specified territory, they agreeing to pay a royalty of ten dollars on each one of the patented articles made and sold by them or by their authority or procurement; that defendants sold, but failed to account and pay as agreed. The answer was a general denial. Upon the trial plaintiff proved the alleged agreement. Defendants offered in evidence another instrument executed by the parties without date, but reciting the execution of the license "this day," and defendants proved that both were executed at the same time. In the second instrument plaintiff, for a valuable consideration, agreed to give a "drawback" of three dollars on each self-rake made and sold by defendants which were attached to other machines than "March's self-rake harvesters." Plaintiff's counsel objected to the instrument as inadmissible under the pleadings, and it was rejected. *Held*, error; that the instruments should be read as one, and, as the complaint only set out part of the agreement, under a denial that the agreement was as set forth, defendants were entitled to put in evidence the part omitted. *Marsh* v. *Dodge*. 533

9. Upon an issue as to whether an assignee for the benefit of creditors has paid a preferred creditor, evidence tending to show that the assignee has not paid another preferred creditor in the same class is incompetent. *Whintringham* v. *Dibble*. 634

—— *Of witnesses belief, when proper.*

See Turner v. *Keller*, 66.

—— *Receipt of payment given by mortgagee, when proper evidence against assignee.*

See Van Keuren v. *Corkins*, 77.

—— *Of market-price at place other than where property is contracted to be delivered, when proper.*

See Rice v. *Manley*, 82,

—— *Improper admission of on probate of will, when not ground for reversal of surrogate's decree.*

See Brick v. *Brick*, 144.

—— *That one signing agreement indorsed on bond intended to adopt seal of obligor, not competent.*

See Brown v. *Champlin*, 214.

—— *Parol, proper in action for contribution between co-sureties to show*

the relations of parties and the equities between them.

See Wells v. *Miller*, 255.

—— *Declarations of officers of corporation when not admissible to show consent, in action for trespass upon its lands.*

See N. F. and S. B. Co. v. *Bachmar.*, 261.

—— *Of usage, in action against broker for conversion of stock pledged, when competent and when incompetent.*

See Baker v. *Drake*, 518.

—— *In action for fraudulent representations on sale, proof of similar representations made by one of the participatorsin the fraud, proper against all.*

See Miller v. *Barber*, 559.

—— *Parol, to show fraud always proper.*

See Hall v. *Erwin* (Mem.), 649.

—— *Of declarations of mortgagor, when competent in action to set aside mortgage as fraudulent against creditors.*

See Stowell v. *Hazelett* (Mem.), 635.

—— *Of party, when properly excluded under sections 399 of Code.*

See Card v. *Duryee* (Mem.), 651

EXCEPTIONS.

Where the evidence in a case will warrant the jury in finding for the plaintiff on the whole issue, and the court is called upon by the defendant to decide it as a question of law, without requesting the submission of any question of fact to the jury, the finding of the facts by the court instead of by the jury, is not a ground of exception. *McCall* v. *S. M. Ins. Co.* 306

—— *When insufficient to raise question on appeal.*

See Keogh v. *Westervelt*, (Mem.) 636.

EXECUTION.

1. In March, 1866, plaintiffs obtained judgment by default against C., and levied upon his interest in a stock of goods of a copartnership of which he was a member; by stipulation the judgment was opened, and C. allowed to come in and defend, all proceedings on the execution to be suspended "until otherwise ordered;" directions to that effect were given to the sheriff, and the firm continued its business without interference. C. died in July 1867; his administrators had an accounting and settlement with the surviving partners, who did not know of the levy, and C.'s interest in the firm was, for a good consideration, transferred by the administrators to W., one of the survivors. The administrators were substituted as defendants in C.'s place in said action. In March, 1868, judgment was perfected therein in favor of plaintiff, whereupon the sheriff, by direction of plaintiff's attorney, sold the interest of C. in the partnership assets, and plaintiff became the purchaser. In an action brought by him against the surviving partners for an accounting, *held*, that the execution had, by the conduct of the plaintiff, and the delay of the sheriff under his directions, become dormant as against *bona fide* purchasers, in which position W. stood; and that the settlement and transfer made by C.'s administrators were conclusive upon plaintiff. *Sage* v. *Woodin.* 578

2. In an action against a sheriff for falsely returning an execution *nulla bona*, the burden is upon plaintiff to show that there was property upon which defendant, by the exercise of proper diligence, could have levied, not upon defendant to show that he could find none. *Watson* v. *Brennan.* 621

EXECUTORS AND ADMINISTRATORS.

1. The personal representatives of a deceased member of a firm may adjust and settle the partnership affairs with the surviving partners, and, in the absence of fraud or mistake, the settlement is conclusive upon the parties, and upon all persons claiming through them, including the creditors of the deceased partner. *Sage* v *Woodin.* 578

2. In March, 1900, plaintiff obtained judgment by default against C., and levied upon his interest in a stock of goods of a copartnership of which he was a member; by stipulation the judgment was opened, and C. allowed to come in and defend, all proceedings on the execution to be suspended "until otherwise ordered;" directions to that effect were given to the sheriff, and the firm continued its business without interference. C. died in July, 1907; his administrators had an accounting and settlement with the surviving partners, who did not know of the levy, and C.'s interest in the firm was, for a good consideration, transferred by the administrators to W., one of the survivors. The administrators were substituted as defendants in C.'s place in said action. In March, 1908, judgment was perfected therein in favor of plaintiff, whereupon the sheriff, by direction of plaintiff's attorney, sold the interest of C. in the partnership assets, and plaintiff became the purchaser. In an action brought by him against the surviving partners for accounting, *held*, that the execution had, by the conduct of the plaintiff, and the delay of the sheriff under his directions, become dormant as against *bona fide* purchasers, in which position W. stood; and that the settlement and transfer made by C.'s administrators were conclusive upon plaintiff. *Id.*

—— *When surrogates' order directing payment of legacy before settlement of accounts of, improper.*
See Gilman v. *Gilman* (Mem.), 631.

EXPERTS.

In asking hypothetical questions, for the purpose of obtaining the opinion of experts, counsel may assume facts as they claim them to exist; and an error in the assumption does not make the interrogatory objectionable, if it is within the possible or probable range of the evidence. *Harnett* v. *Garvey*. 641

EXPRESS COMPANIES.

1. Where there is no express exemption provided by contract, a express company is liable for the carelessness of its own or its servants' employees to persons entering upon its cars as passengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare. *Hale* v. *R. R. Co.* 313

2. One temporarily supplying the place of an express messenger stands in the same position with him, and is entitled to the same protection. *Id.*

FALSE IMPRISONMENT.

1. A court of a justice of the peace has no power to adjudge a person in contempt and to punish him therefor, save in the cases prescribed by statute. (ANDREWS and MILLER, JJ., dissenting.) *Rutherford* v. *Haines*. 388

2. In order to give such court jurisdiction to punish a witness for contempt for refusing to answer a proper and pertinent question, there must be an oath of the party, at whose instance he attended, of the materiality of the testimony (2 R. S., 274, § 279), and a justice is liable in an action for false imprisonment, at the suit of one imprisoned under and in pursuance of his warrant of commitment for such a contempt, where it does not appear in the warrant or by the evidence that such an oath was made. (ANDREWS and MILLER, JJ., dissenting.) *Id.*

FIXTURES.

1. The criterion of a fixture is the union of these three requisites: First. Actual annexation to the realty or something appurtenant thereto. Second. Application to the use or purpose to which that part of the realty to which it is connected is appropriated. Third. The intention of the party making

the annexation to make a permanent accession to the freehold. *McRea* v. *C. N. Bank.* 490

2. The rule prescribed by the Revised Statutes (2 R. S., 88, §§ 6, 8), which, where property is annexed to the freehold, as between the personal representatives and the heirs of a deceased person, makes the mode of annexation the test by which to determine whether it is personal or real property, is not controlling in cases between vendor and vendee. *Id.*

3. In such cases the purpose of the annexation and the intent with which it was made are the most important considerations. *Id.*

4. If the article is attached for temporary use, with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor; but if attached for the permanent improvement of the freehold, he may. *Id.*

5. Where the character of property as personalty or realty is not fixed, but depends upon the intention with which it was annexed to the freehold, the conduct of the party by whom it was annexed is proper to be shown and important as throwing light upon the intention. *Id.*

6. Plaintiff erected upon his premises a building specially adapted for a twine factory and for the purpose of holding the machinery used in the business of manufacturing twine, which, being very heavy, required extra strength in the building. He placed therein the requisite machinery. Each machine was fastened to the floor by bolts, nails or cleats, and was attached to the gearing. Most of the machines were complete in themselves, could be removed without material injury to them or to the building, and could be used in any other building having strength to support and power to run them, but would be of less value if taken out and sold than if they remained as part of the factory. Plaintiff carried on the business for some years, when he contracted to sell, describing the property in the contract of sale as the real estate situate in J., viz., the twine factory, etc., together with all the machinery, etc., the whole being sold for a gross sum. He executed a conveyance describing the land only, and took back a mortgage with the same description. The lands and buildings, without the machinery, were worth much less than the amount of the mortgage. In an action to restrain judgment creditors from selling the machinery on execution as personal property, these facts appeared, and plaintiff testified that the machines were placed in the building for permanent use. *Held* (ALLEN, ANDREWS and EARL, JJ., dissenting), that the evidence was sufficient to justify finding that the original intent of annexation was to make the machinery permanently a part of the freehold; that as between the parties the machines were fixtures, and so covered by the mortgage; and that plaintiff was entitled to the relief sought. *Id.*

7. Also, *held*, that it was immaterial upon the question of intent that plaintiff, at the request of the grantee, after execution of the deed, executed also a bill of sale of the machinery, tools and fixtures. *Id.*

FORECLOSURE.

1. A purchaser at a tax sale of land covered by a mortgage is not affected by a subsequent foreclosure of the mortgage and sale of the mortgaged premises, where he is not made a party to the foreclosure. *Becker* v. *Howard.* 5

2. Where an infant defendant in an action for foreclosure is served with process, but no guardian *ad litem* is appointed, and judgment is taken by default, the judgment is not void, but voidable. *McMurray* v. *McMurray.* 175

3. In such case, where judgment is obtained by fraud and collusion

[illegible] to the [illegible] of the plaintiff to set [illegible] aside as to him. *Id.*

[illegible] of certain premises which were mortgaged to defendant. [illegible] which he [illegible] of the [illegible] with plaintiff. He [illegible] with the [illegible] and with the proceeds paid off the charge [illegible] mortgage. Defendant after [illegible] commenced an action for foreclosure, making the widow and plaintiffs, who were infants, parties. They were served with process, but although their infancy was known no guardian *ad litem* was appointed. The widow answered, but under an arrangement with defendant that he would leave to her for life a [illegible] portion of the mortgaged premises, she executed a deed to him of the portion of the premises directed to be sold, which was worth $5,000, for the nominal price of $500, to be applied on the mortgage; she also withdrew her answer, and stipulated that defendant might take judgment, and allowed him to take judgment for the full amount of the mortgage, without crediting the $500. Judgment by default was taken against plaintiffs, under which the premises were sold and bid in by defendant for much less than their value. There was a surplus on the sale of over $2,000 which was never brought into court, and plaintiffs received no part of it. No report of sale was filed or confirmed. In an action to set aside the judgment and sale, *held*, that the executrix stood in a relation of trust towards plaintiffs, so far as the exercise of the power of sale was concerned, and violated her trust in conveying for a nominal consideration; that defendant was a party to its violation, and that the facts sustained a finding of fraud and collusion; that plaintiffs were entitled to have the decree of foreclosure avoided as to them, and could maintain an original action in equity for that purpose; that as to plaintiffs, their equity of redemption not being barred by the foreclosure, defendant, when he entered under his purchase, became merely a mortgagee in possession, and, as such, bound to account for their share of what he realized from the mortgaged property, over and above the mortgage debt. *Id.*

3. Also *held*, that mere delay on the part of plaintiffs in asserting their rights, where the action was commenced within the time limited for the commencement of such actions, and where defendant had not been prejudiced by the delay, would not defeat plaintiffs' right of action. *Id.*

4. A purchaser at a mortgage foreclosure sale will not be relieved on account of apparent defects in the property, or of defects in the title of which he had notice, and in reference to which he made his bid. *Eggs* v. *Purcell.* 193

5. Immaterial defects and merely technical objections will not defeat the sale. The court will not permit the purchaser to avoid his contract without seeing that the object of the purchase is defeated and that it would be injurious to him to enforce the contract. If he gets substantially what he contracted for, he must complete the purchase. *Id.*

8. Where a mortgage is of a leasehold interest, and in the notice of sale under judgment of foreclosure the lease is referred to, a purchaser is chargeable with knowledge of the contents of the lease, and is supposed to have made his bid in view of its provisions. *Id.*

9. A lease contained a covenant on the part of the lessee that he would not, during the term, assign, transfer or set over the lease or the term thereby created. A purchaser at a sale upon foreclosure of a mortgage given by the lessee upon the leasehold interest claimed that this covenant had been violated by giving the mortgage, and the lease thereby forfeited. It appeared that the lessors made no

objection and were willing to assent if it was required. There was no proof that they had declared or claimed a forfeiture or that the purchaser had applied for their assent. They had received rents after the giving the mortgage with knowledge thereof. The mortgage was given two years before the sale, which was publicly advertised. *Held*, that under the circumstances there was no forfeiture. *Id.*

10. *It seems*, that the giving of the mortgage was not a violation of the covenant, as it was not a transfer of the title or possession; nor was the foreclosure sale a breach, as it was a sale *in invitum*. *Id.*

11. The lease contained a covenant that the lessee would, within two years from the commencement of the term, erect buildings on a portion of the demised premises worth at least $75,000, which was not done. This was known to the purchaser at the time of the purchase. The lessors, knowing the facts, had sued to recover rent without claiming forfeiture, and it did not appear that they had ever claimed any forfeiture; it appeared by affidavits on part of plaintiffs that the purchasers were aware that the lessors were willing to extend the time, and had so extended it. *Held*, that no forfeiture on this account appeared; and that it did not defeat the sale. *Id.*

12. Parties formerly owning the leased lands and other lands on both sides of Twenty-second street entered into an agreement that the buildings thereafter erected thereon, fronting on said street, should be placed back seven feet six inches from the street, so as to have a court-yard in front of the premises, and the houses had been built in conformity to the agreement, including one on that portion of the leasehold premises affected. There was no proof or allegation that this agreement diminished the value of the premises. *Held* (MILLER, J., dissenting), that while this agreement was in one sense an incumbrance upon the premises, it could not be assumed without proof that it injuriously affected their value; and as it was manifest that the purchasers would have bid the same had they known of the agreement, it was an immaterial defect, which the court would disregard. *Id.*

13. In the said agreement was a covenant that the owners should not permit to be erected or carried on upon their respective premises any building or business generally classed as nuisances or dangerous or offensive. A similar covenant of the lessee was contained in the lease. *Held*, that the covenant in the agreement was for the benefit of all the lots, and it could not be inferred that it injured the value of any of them; and as essentially the same covenant was in the lease, this was no ground for relief. *Id.*

14. Plaintiff obtained judgment against W., of which there was unpaid about $700. Execution was issued thereon and a levy made on property of W. W. induced by fraudulent representations, assigned and delivered to plaintiff a bond and mortgage executed by defendant upon the understanding and agreement that plaintiff should sell the same, deduct from the proceeds the amount of the judgment, and a sum agreed upon as compensation for his services, and pay the surplus to W. Plaintiff at the time held a note against W. for $2,590. On receiving the assignment, bond and mortgage, plaintiff assumed to own them, but refused to satisfy the judgment out of them or to abandon the levy unless W. would pay the note. Defendant paid the bond to W. In an action to foreclose the mortgage, *held*, that plaintiff was not entitled to hold the bond and mortgage for the amount of the execution; also, that as the question was not raised upon the trial, plaintiff then claiming the full amount of the bond and mortgage, and was not passed upon by the Supreme Court, it could not be raised here. *Hall* v. *Erwin*. 649

—— *Provision in judgment of, authorizing parties to purchase, will not protect trustee in purchasing for his own benefit.*
See Fulton v. *Whitney*, 548.

FORFEITURE.

—— *Of lease, what will not amount to.*
See Riggs v. *Pursell*, 193.

FORGERY.

It seems, the general rule that an indorser of a promissory note contracts that the instrument itself and the antecedent signatures are genuine does not apply where the holder has procured an indorsement upon a forged note with knowledge of the forgery and upon a representation to the indorser that it was genuine, or where the holder received the note after maturity and without consideration from one who so procured the indorsement. *Turner* v. *Keller*. 66

FORMER ADJUDICATION.

—— *When legatees not bound by surrogate's decree settling executor's accounts.*
See Fisher v. *Banta*, 468.
—— *When decree settling executor's accounts no bar to action against him as trustee.*
See Fulton v. *Whitney*, 548

FRAUD.

1. A parol agreement in reference to lands, not authorized by the statute of frauds (2 R. S., §§ 6, 8), is void as well in equity as in law. *Wheeler* v. *Reynolds*. 227

2. Where, in reliance upon the agreement, one party has so far partly performed that it would be a fraud upon him unless the agreement should be performed, or where the agreement attempts to create a trust and was induced by fraud, the court has equitable jurisdiction to relieve against the fraud and to apply a remedy by enforcing the agreement. In such case, the jurisdiction is founded not upon the agreement but upon the fraud. *Id.*

3. A part performance of a parol agreement, void by the statute of frauds, which will take it out of the operation of the statute, must be substantial, and the acts of part performance must also clearly appear to have been done solely with a view of performing the agreement. *Id.*

4. Where a parol agreement, purporting to create a trust, is part of a scheme of fraud, or a party is fraudulently deprived of valuable rights or property by means thereof, the court will raise an implied trust, treating the person who perpetrated the fraud as trustee *ex maleficio*. *Id.*

5. A fraud which will convert a purchaser of real estate into a trustee *ex maleficio* must be fraud at the time of the purchase, not afterwards; and the mere acquiescence or omission of another to take steps to obtain the property, although induced by faith in the purchaser's parol promise to purchase for his benefit, will not estop him from denying the trust; to work an estoppel, the promisee must have been induced, at the instance of the promissor, to incur some expense or perform some act which he otherwise would not have done. *Id.*

6. A mere refusal to perform a parol agreement, void under the statute of frauds, is in no sense a fraud either in law or equity. *Id.*

7. In an action for specific performance of an alleged parol agreement, plaintiff's evidence tended to show that he being the owner of premises upon which was a mortgage owned by defendant, and being insolvent, agreed by parol with defendant that the latter should foreclose his mortgage, bid in the premises and then sell or hold them until such time

as they could sell them for their value, and, when sold, defendant to deduct the amount of his mortgage, with costs and expenses, and pay plaintiff the balance. It was not agreed that plaintiff should not attend the sale, or that he should prevent others from bidding. Defendant foreclosed and bid in the property; nothing was said at the sale about the agreement, and nothing said or done by defendant to prevent competition. Plaintiff did not attend the sale, but there was no proof that he omitted to attend or to procure others to attend in reliance upon the agreement, and that, but for the agreement, he or some other person procured by him could or would have bid it off. Defendant's claim, with costs and expenses, was about what the land was worth. There was no allegation or proof of fraud in the agreement or sale. Defendant took possession of the premises, paid taxes, etc., for nine years when this action was commenced, the land then having greatly increased in value. *Held*, that the alleged agreement could not be enforced either on the ground of part performance or as a parol trust. *Id.*

8. Defendant sold and assigned to plaintiff a legacy. In an action to recover damages, upon allegations that the purchase was induced by fraudulent representations, it appeared that defendant represented, in substance, that the legacy was as good as a mortgage upon any man's farm, and that plaintiff might inquire. Plaintiff did inquire of persons to whom he was referred by defendant, who stated the legacy to be good. Its value depended upon the question whether it was chargeable upon the testator's real estate. The personal estate was insufficient, but both real and personal more than sufficient to pay it. An attorney, at the request of the parties, examined the will and gave his opinion that the legacy was good. In an action subsequently brought to obtain a construction of the will it was adjudged that the legacy was not a charge on the real estate. The court was requested to charge, in substance, that what was said by defendant was, under the circumstances, but an expression of opinion. The court refused so to charge, and submitted that question to the jury. *Held*, error; that defendant made no false statements of facts, and what he said could have been only an expression of opinion. *Duffany* v. *Ferguson*. 482

9. It appeared that defendant had been informed, prior to the sale, by one of the executors that an action for a construction of the will was about to be commenced, and that he did not disclose this to plaintiff. *Held* (FOLGER, and EARL, JJ., dissenting), that the judgment could not be sustained on the ground of a fraudulent concealment, although the action might have been maintained thereon, as this did not remedy the error in the refusal to charge, under which the jury may have held the representations made were fraudulent, and so have determined the case. *Id.*

10. A corporation was organized under the general manufacturing law for the purpose, as stated in its charter, of dealing in patent-rights and the manufacture and sale of patented articles. Defendant B. was president, and defendant S. secretary, and both took an active part in the organization. They, with the other promoters of the company, had purchased for $8,500 an interest in a "patent hay-loader," giving their notes for most of the purchase-money. The scheme to organize the company was set on foot to realize means to relieve themselves from liability thereon and to secure advances. The interest in said patent was conveyed to the company, and was the only property held by it to represent its nominal capital of $35,000. To promote the sale of stock, and give credit to the enterprise, various prominent men were solicited and induced to subscribe for stock, giving their notes therefor upon a secret agreement, which was carried out, that the notes should be given up without payment. Plaintiff was induced

to subscribe for $500 of the stock, giving his note therefor, payable to defendants or bearer, upon representations of defendant B. that the invention was of great value, accompanied by a statement of the names of the stockholders; B. including in the list the names of those who had subscribed under the secret agreement. The negotiations were had in the office of defendant S., used as the office of the company; he was in another room at the time. Stock was also sold to others upon similar representations, and enough was realized from sales to pay the advances and liabilities of the original purchasers of the patent. Plaintiff's note was sold before maturity, and plaintiff paid the same. In an action to recover damages for fraud, the evidence tended to show that the patent was of no value. *Held*, that the evidence was sufficient to sustain the action, as the representation of the value of the invention was accompanied with a false representation of an extrinsic fact, calculated to, and which did, put plaintiff off his guard, and induced him to give credit to the statement of value. *Miller* v. *Barber*. 558

11. Also, *held*, that the representations so made by B. were properly received in evidence as against S., the evidence showing that he knew, from its inception, of the scheme for securing fictitious subscriptions, and that he accepted the benefits resulting from the fraud. *Id.*

12. This evidence was received before the connection of S. with the company had been shown; it was not offered or received to show him a party to the fraud. *Held*, no error, as the order of proof was within the discretion of the court. *Id.*

13. Also, *held*, that evidence of representations made by defendants to others of a similar character with those made to plaintiff, and made about the same time under similar circumstances, was competent. *Id.*

14. The court charged that the rule of damages was the difference between the value of the stock as represented and as it was, but refused to charge that no recovery could be had because no proof of difference in value had been given. *Held*, no error; that the value of the stock depended upon the value of the invention, as the company had no other property; and that from the representation that the invention was a valuable one the jury had a right to assume, as against defendants, that if the representation had been true the stock would have been worth what plaintiff paid. *Id.*

15. The court having charged in substance that the jury must be satisfied from the evidence that defendants were guilty of the fraud charged before a verdict could be found against them, was requested by defendants' counsel to charge that they must be satisfied by clear and substantial proof. *Held*, no error. *Id.*

16. Where one obtains an assignment to himself of a bond and mortgage by means of fraud, and with the ostensible purpose of selling the same for the owner, the equitable title remains in the assignor, and payment to him by the mortgagor is a satisfaction of the mortgage and a defence to an action brought by the assignee to foreclose the same. *Hall* v. *Erwin*. 649

17. Parol evidence is competent to show the circumstances attending the assignment. *Id.*

18. Fraud may always be shown by parol, and when established will vitiate any transaction, however solemn. *Id.*

19. Actual and clearly proved fraud will not be protected by the statute prohibiting parol trusts in real property. (2 R. S., 134, § 6.) *Id.*

20. Plaintiff obtained judgment against W., of which there was unpaid about $700. Execution was issued thereon and a levy made on property of W. W.,

induced by fraudulent representations, assigned and delivered to plaintiff a bond and mortgage executed by defendant upon the understanding and agreement that plaintiff should sell the same, deduct from the proceeds the amount of the judgment, and a sum agreed upon as compensation for his services, and pay the surplus to W. Plaintiff at the time held a note against W. for $2,500. On receiving the assignment, bond and mortgage, plaintiff assumed to own them, but refused to satisfy the judgment out of them or to abandon the levy unless W. would pay the note. Defendant paid the bond to W. In an action to foreclose the mortgage, *held*, that plaintiff was not entitled to hold the bond and mortgage for the amount of the execution; also, that as the question was not raised upon the trial, plaintiff then claiming the full amount of the bond and mortgage, and was not passed upon by the Supreme Court, it could not be raised here. *Id.*

—— *When infant may maintain an action to set aside judgment of foreclosure, on account of.*

See McMurray v. *McMurray*, 175

—— *In action for fraudulent representations on sale of note, costs incurred in attempting to collect not proper item of damages.*

See Slingerland v. *Bennett* (Mem.), 611

FRAUD (STATUTE OF).

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

1. C., being indebted to plaintiff, conveyed certain lands through a third person, without consideration, to his wife, who died intestate. Plaintiff thereafter recovered judgment against C., and, after return of execution thereon unsatisfied, commenced an action against C. and the heirs of his wife to set aside the conveyance as fraudulent against creditors, and obtained a judgment setting it aside as to plaintiff, declaring his judgment a valid lien thereon, and appointing a receiver to sell, etc. The receiver advertised the land for sale. Defendant M., one of the heirs, and who had succeeded by purchase to the rights of nearly all the others, tendered the amount due on plaintiff's judgments, and demanded an assignment thereof, which was refused. M. thereupon made a motion to compel an assignment upon payment, and that he be subrogated to the rights of the owner of the judgments, which was denied *Held*, error; that the title of the heirs was good as against C., and upon payment of the judgments, which were his debts, to save their lands, they were entitled to subrogation as against him. *Cole* v. *Malcolm*. 363

2. A transfer by a debtor of all his property, real and personal, without consideration and in trust for him and for his benefit during his life, and after his death for the payment of his debts, etc., is, *per se*, conclusive evidence of fraud as to existing creditors; no extrinsic circumstances or evidence *aliunde* is necssary to establish a fraudulent intent. It is void, therefore, as against such creditors both as to the real and the personal estate. *Young* v. *Heermans*. 374

3. The innocence of any fraudulent intent, upon the part of the transferee, will not protect his title. *Id.*

4. Where, at the time of such a transfer, the transferer has in his hands, as agent for another, securities belonging to his principal for which he is liable to account, although no demand has been made upon him to transfer and surrender the securities, yet there is a fiduciary and pecuniary obligation, and a contingent liability which makes the principal a creditor, within the meaning of the statute, against fraudulent conveyances. (2 R. S., 135, § 1; 137, § 1.) *Id.*

5. It is not necessary for the principal, in order to impeach the trans-

fer for fraud, to show that his agent actually intended at the time a misappropriation or conversion of the securities. *Id.*

6. After the commencement of an action by a principal to set aside such a conveyance made by his agent, the latter died; his personal representatives were substituted as defendants but his heirs at law were not brought in. *Held*, that while, so far as the real estate was concerned, the proper parties were not before the court to authorize a determination of the question as to whether a legal estate vested in the grantee upon valid trusts, as against the heirs; yet that plaintiff was entitled to judgment, declaring the conveyance void and his judgment a lien upon the real property as against the grantee, as if no conveyance had been made, with leave to proceed by execution against the lands according to the course and practice of the court. *Id.*

—— *Evidence of declarations of mortgagor, when competent in action to set aside mortgage as fraudulent against creditors.*

See Stowell v. *Hazelett* (Mem.), 635.

GENERAL TERM.

1. Where a review of facts by an appellate court is proper, it is, as a general rule, its duty to examine the evidence and determine the facts for itself; and the rule that where there is conflicting evidnce or any evidence to sustain the finding it is error to reverse, does not apply (Code, §§ 268, 348.) *Godfrey* v. *Moser.* 250

2. Where, in reviewing a judgment entered upon the report of a referee in an action upon an account, the General Term find certain items of said account to have been established by the evidence and others not, it is entirely within its discretion whether to permit the judgment to stand at the election of the plaintiff for the items it approved, or to reverse the whole judgment and order a new trial (Code, § 330), and the exercise of this discretion is not reviewable here. *Id.*

3. *It seems* that where a series of orders have been granted by the court all relating to the same subject and so connected with each other that if one is wrong all are wrong, each order being but a part of the whole, the General Term on appeal from one or more of the orders having found them erroneous, may set aside the whole so that the records of the court may be consistent. *Cochran's Exrs.* v. *Ingersoll.* 652

GIFT.

In an action to enforce specific performance of an agreement to convey lands, the court found, in substance, that one S., intending to give to plaintiff certain lands, executed a contract for the sale and conveyance thereof to her on payment of $1,100, which she agreed to pay. It was never intended that she should pay any thing, and S. subsequently indorsed upon the contract a receipt in full of the purchase-price; no money was in fact paid. *Held*, that whatever may have been the intent, the agreement to convey was not voluntary, as it was for a valuable consideration; that the contract did not operate as a gift of the land, and conclusively rebutted an intent to make a present gift; that the findings were in effect that the vendor, to accomplish his purpose of giving the lands, gave the debt which represented his interest therein; that the receipt operated as a valid and complete gift of the debt, leaving the right of the plaintiff to a conveyance in force, as if the debt had been paid. *Ferry* v. *Stephens.* 321

GUARANTY

—— *When agreement indorsed on bond to be considered as.*

See Brown v. *Champlin*, 214.

HABEAS CORPUS.

1. In proceedings under the statute for contempt (2 R. S., 534, *et seq.*), the court has jurisdiction to determine the amount of costs and expenses to be imposed as a fine in case the party is adjudged in contempt, and if items are included which ought not properly to be allowed, this is not an excess of jurisdiction and does not render the commitment void. *People ex rel.* v. *Jacobs.* 8

2. The action of the court, therefore, cannot in such case be reviewed on *habeas corpus.* *Id.*

—— *To obtain discharge of prisoner in State prison, when properly remanded.*

See People ex rel. v. *Warden,* 342.

HIGHWAYS.

1. Where commissioners of highway, in constructing an embankment upon a highway, omit to put therein a sufficient culvert to carry off the surface water from adjoining lands, their successors in office are not liable in a private action at the suit of the owner, for injuries resulting from the accumulation of the water upon said lands, caused by the embankment. *Gould* v. *Booth.* 62

2. *It seems,* that commissioners, in grading highways, are not bound to provide a channel for the drainage of surface water, and are not liable for injuries resulting from their omitting so to do. *Id.*

3. In an action, commenced in 1873, against commissioners and an overseer of highways for damages alleged to have been sustained by turning the waters of a stream from a highway upon plaintiff's adjoining premises, it appeared that originally the stream crossed the highway on to said premises, then, turning, recrossed the highway. About 1850, an artificial channel was made, proceeding a short distance from the first crossing, along the side of the traveled track of the highway, and thence through an artificial ditch on to and over plaintiff's land. In 1864, plaintiff, as overseer of highways, extended the artificial channel along the highway until it intersected the original stream; he also filled up the artificial channel on his land; the waters injured the highway, rendering it at times impassable, and defendants turned them into the original channel. *Held,* that the first change did not relieve plaintiff's land from the burden of the stream, or give him any prescriptive right to have it flow along the highway; that, as overseer, he had no right to relieve his own premises at the expense of the public; that it was the right and duty of defendants to abate the nuisance caused by the stream obstructing the highway, and they were justified in restoring said stream to its original channel. *Kellogg* v. *Thompson* 88

4. *It seems* that a prescriptive right could not have been acquired, as against the public, by a twenty years' flow of the water along the highway. *Id.*

5. Where the owner of land lays the same out into lots and streets, makes and files a map or plot thereof, and sells and conveys lots by the map bounded upon the streets, as delienated thereon, this does not necessarily, and without other facts, make the streets so laid out public highways. *N. F. S. B. Co.* v. *Bachman.* 261

6. To constitute a public highway by dedication, there must not only be a setting apart and a surrender to the public use of the land by the owner, but, also, an acceptance and formal opening by the proper authorities, or a user. *Id.*

7. The acts and declarations of the landowner must be unmistakable in their purpose, and decisive in their character, showing the intent to dedicate the land absolutely and irrevocably to the public use. *Id.*

8. Upon a map, made and filed, of

lands in the village of N. F., so laid out, was a statement and reservation as to a portion of the streets and avenues, to the effect that they were laid out not only with reference to public use, but for the use of hydraulic establishments, and the proprietors therefore reserved a discretionary power to direct how much and what part of said streets should be used for canals and races, and what part appropriated to public use. In an action for trespass against the village superintendent, in entering upon a part of a street as to which the reservation applied, cutting down trees, etc., for the purpose of opening it as a highway, *held*, that the reservation negatived any intention of dedicating the specified streets and avenues absolutely and irrevocably to the public use, and some further act and declaration by the owners was necessary to a complete donation; that, before the public could acquire any rights or take any easement under the qualified or proposed dedication, the assent and donation of the proprietors was required. *Id.*

9. The original map was filed in 1832. In 1861, under the reserved right, a new map was filed, upon which the *locus in quo* was not delineated as a street; up to this time there had been no occupation by any public overt act, or any use as a highway, or any act assuming to recognize or accept any dedication, absolute or qualified, of that part of the street, save a formal resolution of the village trustees declaring the same a public highway; the entry by defendant was after filing the new map. *Held*, that, aside from the reservation, the proprietors had a perfect right to recall the donation, which having been done the action would lie. *Id.*

10. Declarations of plaintiff's treasurer, and one of its directors, consenting to and directing the cutting down of the trees and opening the street were admitted as evidence on the part of defendant, under objection. *Held*, error; that the officer, simply as such, was not authorized to speak for and bind the corporation, and, without further evidence of his authority, his declarations were incompetent. *Id.*

IMPRISONMENT.

1. In legal view, punishment for a crime does not begin until after the criminal has been convicted and sentenced; any imprisonment prior to sentence will not inure to his benefit as part of the punishment. *People ex rel* v. *The Warden, etc.* 342

2. As to whether it is within the province of the courts to award to a prisoner in a State prison the time to which he is entitled for good conduct, *quære*. *Id.*

3. A court in imposing sentence, may take into consideration the time the convict has been in custody awaiting trial, but it is a matter of discretion only. *Id.*

4. On the sixth of January, 1873, the relator was convicted of murder and sentenced to be hanged. On writ of error, proceedings were stayed; the judgment was reversed, and a *venire de novo* ordered. He was again tried October 29, 1873, having meanwhile been confined in jail; was convicted of manslaughter in the third degree, and sentenced to imprisonment in State prison at hard labor for four years, the maximum punishment for that crime, and was put into a State prison November 1, 1873. On February 5, 1875, he was brought out on writ of *habeas corpus*, and claimed that the time of imprisonment between the first and the second trials should be taken as part of his sentence; that this, with the time served in State prison, and the abatement earned by good conduct, in accordance with statutes (chap. 417, Laws of 1863; chap. 415, Laws of 1863; chap. 321, Laws of 1864; chap. 451, Laws of 1874), made up the full term of imprisonment. *Held*, that the claim was untenable; and that the relator was properly remanded. *Id.*

INFANTS.

1. Where an infant defendant in an action for foreclosure is served with process, but no guardian *ad litem* is appointed, and judgment is taken by default, the judgment is not void, but voidable. *McMurray* v. *McMurray*. 175

2 In such case, where judgment is obtained by fraud and collusion, an action may be maintained on the part of the infant to set it aside as to him. *Id.*

INJUNCTION.

1. The court has no power, after judgment against plaintiff in an action, and pending an appeal by him therefrom, to grant an injunction or to revive or continue a temporary injunction previously granted. *Spears* v. *Mathews*. 127

2. N. granted to defendant U. "all the water that will run through a lead pipe with a three-eighths of an inch bore from a spring or well," on the premises of the grantor, with the privilege of conveying the water in a lead or wooden pipe from the spring to a public highway. *Held*, that the reference to the size of the pipe was not simply as a measure of the water granted, but that defendant was restricted to the use of a pipe with a bore of three-eights of an inch, all the way from the spring to the highway; and, it appearing that although the water was taken from the spring through a short piece of lead pipe of the size specified, then through a larger pipe to the highway, and was discharged through a faucet but two-eighths of an inch in diameter, more water was drawn than would run through a pipe of the uniform size of three-eights of an inch, that an action could be maintained restraining defendants from using a larger pipe for any portion of the distance. *Markham* v. *Stowe*. 574

INSURANCE (ACCIDENTAL).

An accidental insurance policy contained a clause providing that no claim should be made thereunder "where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drink." The insured was killed by a pistol shot. In an action upon the policy, *held*, that if the death of the insured occurred while he was under the influence of intoxicating drink, this alone avoided the policy without regard to the question whether that condition was the natural and reasonable cause of the death, or in any manner contributed thereto; and, also, that such a provision was proper and reasonable. *Shader* v. *R. R. A. Co.* 441

INSURANCE (FIRE).

1. A policy of fire insurance contained a clause declaring, in substance, that in case the assured cause the property to be described other than it really is, so that it be charged at a lower premium, or if the risk be increased by means within his control, without notice and consent, the policy will be void; also, that if the risk be increased by the erection of buildings, "or by the use of neighboring premises or otherwise," or if for any other cause the company shall so elect, it shall be optional with it, after notice to the assured or his representative, to terminate the insurance; in that case refunding a ratable proportion of the premium. In an action upon the policy, defendant's evidence tended to show that before the loss it notified the insured and plaintiff, who, as mortgagee, was, by the policy, entitled to receive the insurance in case of loss, that it elected to and did cancel the policy; defendant also tendered back the unearned premium. *Held*, that it was entirely optional with defendant when, and for what reason, to terminate the insurance, and the motive or the sufficiency of the cause could not be inquired into; and that, therefore, a refusal of the court so to charge, and a refusal to submit the question of cancellation to the

jury, was error. *I. L. I. and T. Co.* v. *F. F. I. and T. Co.* 119

2. In an action upon an alleged contract of fire insurance, plaintiff's evidence tended to show that he had insured with defendant for many years, and had been in the habit of getting policies without paying premiums at the time. That plaintiff called upon defendant's secretary September 6, 1871, in reference to insurance upon a hotel on which defendant then had a policy, and endeavored to get it insured at a less rate. The agent replied that he would insure it at the old rate, no less. To which plaintiff replied, "very well, I must have it insured." The defendant made out a policy the next day, dating it the sixth. On the ninth, plaintiff called and asked the secretary if he had taken the building. That officer replied that he had, at the old price. On October sixteenth, plaintiff again called to get insurance on other property, and told a clerk of defendant's (the secretary not being in) that he had another policy, and would pay for both together. The clerk replied, "very well." The hotel was burned November seventh. Plaintiff called the next day, informed the secretary of the loss, and offered to pay for the two policies, but the secretary refused to accept payment for the policy in suit, claiming defendant not to be liable, because the house was vacant. A few days thereafter, plaintiff paid the premium on the second policy from its date, which was accepted. The policy in suit contained a clause that the company would not be liable until the premium was paid. *Held*, that the evidence was sufficient to require the submission to the jury of the question whether a credit was not intended to be given, and this condition waived; and that a nonsuit was error. *Church* v. *La F. F. Ins. Co.* 222

3. A policy of fire insurance, by its terms, insured plaintiff against loss "on his two-story and extension shingle-roof building, *occupied as dwelling.*" In an action upon the policy it appeared that at the time it was issued the building was unoccupied. *Held*, that the clause was a warranty that the house was occupied as a dwelling; and that it being unoccupied, there was a breach of the warranty which avoided the policy. *Alexander* v. *G. F. Ins. Co.* 464

4. The policy also contained a clause, in substance, that any person other than the assured procuring the insurance to be taken shall be deemed to be the agent of the assured, not of the company. *Held*, that under this clause defendant was not bound by knowledge on the part of the agent, through whom the policy was procured, that the house was unoccupied. *Id.*

5. Also, that, assuming he was agent of defendant for the purpose of taking the application, his knowledge of the falsity of the warranty did not affect its validity. *Id.*

6. An action upon a policy of fire insurance was commenced in the name of L., as assignee. Subsequently, upon affidavits that it had been reassigned, the insured was substituted as plaintiff; defendant acquiesced in the order by receiving costs allowed to it. On the trial defendant objected to a recovery, without proof of an assignment and reassignment. The objection was overruled, and a motion was granted, without objection, conforming the complaint to the proof. *Held*, that the objection was untenable, as after the granting of the motion to conform there was nothing in the pleadings or proofs to show an assignment. *W. T. M. Co.* v. *H. F. Ins. Co.* 613

7. The policy contained a clause that the company would not be liable, unless premiums "be actually paid to the company." It was delivered by defendant's agent, without requiring prepayment. Payment of the premiums was demanded several times, but not paid. Plaintiff's officer, at the time of the last demand, promised to pay in a few days. The policy was not canceled, nor was plaintiff notified that it would be void

unless payment was made. *Held*, that the evidence justified a finding that the waiver of payment continued up to the loss, and that defendant was liable. *Id.*

INSURANCE (LIFE).

1. Plaintiff's intestate, I., procured a policy of life insurance from defendant through W., its general agent. The premiums were paid semi-annually to W., who received and remitted them to defendant. The agency of W. terminated in May, 1874, save to receive and forward such premiums as should be paid to him thereafter. Defendant in June, 1874, sent a notice to I. that a premium on his policy would fall due on the twenty-second. Across the face was stamped the words "Remit direct to the home office." I. sent to W. a P. O. order for such premium. He had previously paid in the same manner and no objection had been made. W. was absent from home, but his daughter, in accordance with his instructions, wrote I. that her father would send receipt on his return. He returned home after the time for payment by the terms of the policy had expired, drew the money on the order and forwarded it to defendant, who refused to accept. *Held*, that the evidence of notice of the revocation of the agent's authority at most raised a question of fact for the jury; that it was no objection that the payment was by P. O. order; and that the authority given by W. to his daughter to receive premiums falling due in his absence was within the general scope of his authority, and payment to her was payment to him. *McNeilly* v. *C. Ins. Co.* 233

2. Upon the back of the policy was printed a notice to the policy-holders that payment to agents would not be deemed valid unless a receipt, signed by certain specified officers of the company, was received at the time. *Held*, that this was not a limitation of the power of a general agent, and payment to him was valid without a receipt; also that, as at the time when W'.s general agency terminated he returned all receipts in his hands and was authorized to receive premiums thereafter without having receipts in advance furnished him, this was a waiver of the instructions contained in the notice. *Id.*

3. The facts that a person is authorized by a foreign life insurance company to solicit and take applications for insurance, to issue and deliver policies and to receive premiums, and deliver receipts for them, do not, as matters of law, constitute him a general agent of the company, authorized to waive conditions in a policy as to payment of premiums. (CHURCH, Ch. J., ANDREWS and MILLER, JJ., dissenting.) *Mersereau* v. *P. M. L. Ins. Co.* 274

4. As to whether, where upon a policy there is indorsed a notice that no agent has authority to receive any premiums without first presenting a receipt signed by the president or secretary of the company, or to alter the policy or receive any premium after it is due, a general agent can waive the condition forfeiting it in case of non-payment of premiums, *quære* (CHURCH, Ch. J., ANDREWS and MILLER, JJ., holding that he can; ALLEN, RAPALLO and EARL, JJ., that he cannot in the absence of evidence that the company has, by direct authority, enlarged his powers, or has knowingly permitted him to act beyond the scope of the power as thus limited; FOLGER, J., not voting). *Id.*

INSURANCE (MARINE).

1. In policies of marine insurance upon cargo, a condition is implied that the goods insured will be stowed in the usual and customary place for the carriage of goods of that description; and any breach of this implied warranty by which the risk is varied and the perils insured against increased, vitiates the policy. *Leitch* v. *A. M. Ins. Co.* 100

2. In actions upon marine insurance the testimony of underwriters as experts is admissible upon the question of materiality of circumstances affecting the risk, and where evidence of this kind is necessary for the reason that the fact is not sufficiently obvious to enable the court to decide it without such aid, the testimony is to be treated the same as that in reference to any other fact, and if there is no conflict the fact of materiality or immateriality must be held as the witnesses testify. *Id.*

3. In an action upon a policy of marine insurance covering a quantity of gold coin it appeared that the coin was not stowed in or under the captain's cabin, the usual places for stowing freight of that description, but in the "run," under the cargo and ballast. This was without the knowledge of defendant. The evidence was undisputed that it was thus exposed to a different risk and the peril in case of disaster at sea greatly increased. The vessel sprang a leak at sea and was abandoned. Underwriters, called as experts, all testified that the unusual method of stowage was a fact material to the risk. *Held*, that the court erred in submitting the question of materiality to the jury; that the risk was not that insured against, and the policy never attached. *Id.*

4. The statement in a policy of marine insurance of the ultimate and intermediate *termini* of the voyage does not prohibit stopping at other intermediate ports, which, by the course of navigation, or the usage of trade, are usually entered in making the insured voyage. *Mc Call* v. *S. M. Ins. Co.* 505

5. In the absence of words excluding it, the course of navigation prescribed by usage may, and indeed must, be pursued. *Id.*

6. Defendant issued a policy insuring the bark L. "at and from Miramichi to a port in Cape Breton, and at and from thence to New York, with privilege of carrying coal," etc. The vessel had previously sailed from the port of departure to Big Glace bay, a port in Cape Breton, under a charter to load with coal, containing a provision that if, on arrival, the captain should not consider it safe to remain and load, he was at liberty to proceed elsewhere, in which case the charter was to be considered canceled. Big Glace bay is exposed to the sea, affording no protection from winds and storms, and it is the usual custom for vessels bound to Big Glace bay for coal, during the fall and winter months, to first stop at Sydney, a port in Cape Breton having a good harbor, first reached on a voyage from Miramichi, and when their masters are notified that the vessels can be loaded, to proceed to the port of lading. This custom was established for the safety of vessels. The L. arrived at Sydney November twelfth; the next day her master went to Big Glace bay, and finding no wharf, concluded it an unsafe place to load and went to Cow bay, another port in Cape Breton having a substantial wharf, and there entered into a charter to load with coal for New York, on December twelfth. As soon as her turn to load arrived the L. sailed to Cow bay, and while loading was driven upon the rocks and injured. In an action upon the policy, *held*, that the vessel, by stopping at Sydney, did not exhaust the privilege given in the policy, nor was it a deviation; that the vessel was free to choose any customary coaling port on the island, and in going to the selected port to make the voyage in the usual and customary manner; that therefore the privilege of the policy was not exhausted by going into Sydney for safe anchorage according to usual custom; also, that the reservation in the first charter of the right to cancel it, made it uncertain what the actual voyage would be, and it could only be made certain when the master should elect to what port of lading he would go, which election was made at Sydney, in the direct course of a voyage to the port selected, so that there was no deviation. *Id.*

7. *It seems*, that if the master had elected, in the first instance, to go to Big Glace bay, and had first gone to that port and then sailed for Cow bay, his privilege under the policy would have been exhausted, as an election once made determines the right. *Id.*

8. The mere fact that an insured vessel exists in specie, does not necessarily prevent the insured from claiming a total loss without abandonment. If after encountering a sea peril it is, for that reason, justifiably sold by the master, the insured may claim a total loss, accounting to the insurer for the proceeds of the sale as salvage received for his benefit. *Id.*

9. Where, by the terms of a policy of insurance on the cargo of a canal boat, if in consequence of ice or the closing of navigation the voyage cannot be finished the same season, the risk is to terminate at the time the voyage shall be stopped, three days being given to discharge the cargo, the insured has the right to make every effort to continue the voyage, notwithstanding it be apparent that it can not be completed by reason of ice; the actual stoppage, is the time from which the three days for discharging are to be computed, and mere delays, coupled with the impossibility of completing the entire voyage, do not show actual stoppage; the voyage can only be stopped by act of the master or causes making further progress impossible. The insured has also the right, although there are obstructions by ice, to continue the voyage to a proper place to discharge the cargo and lay up the boat for winter. *Sherwood* v. *M. M. Ins. Co.* 630

JUDGMENT.

1. Where an infant defendant in an action for foreclosure is served with process, but no guardian *ad litem* is appointed, and judgment is taken by default, the judgment is not void, but voidable. *McMurray* v. *McMurray*. 175

2. In such case, where judgment is obtained by fraud and collusion, an action may be maintained on the part of the infant to set it aside as to him. *Id.*

3. A judgment taken by default in summary proceedings for non-payment of rent, until reversed, set aside or vacated, is conclusive in any action by the landlord against the tenant to recover the rent, of the facts alleged in the affidavit, and which are required by the statute to be alleged as the basis of the proceedings, to wit: the tenancy, the acceptance by the the tenant, the non-payment of rent due, and the holding over after default in payment. *Brown* v. *The Mayor*. 385

4. Where a motion to vacate a judgment taken by default is made both on the ground of mistake, inadvertence, surprise or excusable neglect, and also on the ground of fraud, and the facts warrant the granting of the motion on the latter ground, it will be presumed, on appeal from an order of General Term, affirming an order granting the motion, as against an objection, that the order was granted more than a year after notice of judgment, and so was improper under section 174 of the Code; that the order was granted on the ground of fraud, and the limitation of said section does not apply. *Dinsmore* v. *Adams*. 618

—— *In action to set aside fraudulent conveyance.*

See Young v. *Heermans*, 374.

—— *In action at law against a co-surety for contribution.*

See Easterly v. *Barber*, 433.

JUDICIAL SALES.

1. A purchaser at a mortgage foreclosure sale will not be relieved on account of apparent defects in the property, or of defects in the title of which he had notice, and in reference to which he made his bid. *Riggs* v. *Purcell*. 193

2. Immaterial defects and merely technical objections will not de-

fest the sale. The court will not permit the purchaser to avoid his contract without seeing that the object of the purchase is defeated and that it would be injurious to him to enforce the contract. If he gets substantially what he contracted for, he must complete the purchase. *Id.*

8. Where a mortgage is of a leasehold interest, and in the notice of sale under judgment of foreclosure the lease is referred to, a purchaser is chargeable with knowledge of the contents of the lease, and is supposed to have made his bid in view of its provisions. *Id.*

JURISDICTION.

1. In proceedings under the statute for contempt (2 R. S., 534, *et seq.*), the court has jurisdiction to determine the amount of costs and expenses to be imposed as a fine in case the party is adjudged in contempt, and if items are included which ought not properly to be allowed, this is not an excess of jurisdiction and does not render the commitment void. *People ex rel.* v. *Jacobs.* 8

2. The court has no power, after judgment against plaintiff in an action, and pending an appeal by him therefrom, to grant an injunction or to revive or continue a temporary injunction previously granted. *Spears* v. *Mathews.* 127

3. Where, in the matter of a probate of a will, the surrogate has acquired jurisdiction of all the parties in interest, he is not divested of this jurisdiction by the death of one of the parties, and where the survivors appear and litigate, without objection because of an omission to bring in the heirs and representatives of the deceased party, such omission cannot impair the validity of the proceedings as to the survivors. *Brick* v. *Brick.* 144

4. The legislature has authority to confer upon the Marine Court of the city of New York whatever civil or criminal jurisdiction it deems best, subject only to the restriction that its character as a local court shall be preserved. (Const., art. 6, § 19.) *Anderson* v. *Reilly.* 19

5. It may confer jurisdiction in actions of assault and battery, without limit as to the amount of the claim or recovery. *Id.*

6. The provision of the Marine Court act of 1872 (§ 3, sub. 12, chap. 629, Laws of 1872) providing that any court of record in the city and county of New York shall have power to send any action of assault and battery, etc., brought therein, to the Marine Court for trial, and giving the Marine Court jurisdiction of such action, as comprehensive as that of the court transferring it, although ineffectual to authorize a compulsory transfer, yet may have effect where the parties consent thereto, and the act may be read as if this condition was inserted. *Id.*

7. Summary proceedings were commenced in a District Court of the city of New York by plaintiff against the defendant and the board of police commissioners to dispossess them for non-payment of rent. The affidavit and summons alleged that defendant was the tenant, and occupied through itself and the said board as undertenants. Defendant did not appear, but the board appeared, and, by consent, the matter was adjourned. *Held*, that the adjournment was proper, and that the court was not thereby ousted of jurisdiction to proceed on the adjourned day against defendant. *Brown* v. *The Mayor.* 395

8. The affidavit, upon which the proceedings were based, was sworn to before a notary public. *Held*, that it was properly verified. (§ 4, chap. 741, Laws of 1870.) *Id.*

9. One owning an undivided interest in letters patent cannot maintain an action in a State court to recover compensation for its use to the extent of his interest from one using it without his per

mission. The cause of action does not arise upon contract, but is simply the infringement of a patent right, and so arises under the patent laws of the United States; the United States courts, therefore, have exclusive jurisdiction. (ALLEN, J., CHURCH, Ch. J., and EARL, J., concurring.) *De Witt* v. *E. N. M. Co.* 459

10. A plaintiff in an action, the subject-matter of which is within the jurisdiction of a court of a justice of the peace, cannot, by merely demanding judgment for a sum exceeding the jurisdiction of that court, oust it of jurisdiction, and thereby entitle himself to full costs in a superior court wherein he brings the action upon a recovery of a nominal sum; the recovery is conclusive of the amount in controversy, as affecting the question of costs. *Powers* v. *Gross.* 646

11. The Marine Court of the city of New York has no jurisdiction of an action against the city corporation. *Callahan* v. *The Mayor.* 656

12. The provisions of the acts of 1860 (chap. 379, Laws of 1860) and 1868 (chap. 853, Laws of 1868), giving to the Supreme Court of the first judicial district, the Court of Common Pleas for the city and county, and the Superior Court of the city, exclusive jurisdiction in all actions where the city corporation is a party defendant, are not repealed or affected by the provision of the act of 1872, relating to the Marine Court (sub. 15, § 2, chap. 629, Laws of 1872) which gives to said court jurisdiction of actions against corporations created under the laws of this State, and having an office or transacting business in the city of New York; that provision is only applicable to private corporations. *Id.*

13. The officers or agents of a municipal corporation cannot, by consent or omission to object, give to a court jurisdiction in an action against the corporation where the law has conferred elsewhere exclusive jurisdiction of actions against it. *Id.*

14. Accordingly *held*, that the appearance and answer, by attorney for defendant, in an action brought in the Marine Court against the corporation of the city of New York, was not a waiver of the question of jurisdiction, and did not confer jurisdiction. *Id.*

—— *Of Justice's Court to punish for contempt.*

See Rutherford v. *Holmes*, 368.

JURY.

1. The office of commissioner of jurors, created by the act of 1847, "in relation to jurors of the city of New York" (chap. 495, Laws of 1847), was not made thereby distinctively a county office, nor did the commissioners succeed to powers theretofore exercised by an officer of the county of New York. *People ex rel.* v. *Dunlap.* 162

2. Assuming, however, that it was a county office, it was a new office created by the act, the legislature had power subsequently to change its character from a county to a city office, and to provide for a different mode of appointment. *Id.*

3. The provision, therefore, of the act of 1873, "to reorganize the local government" (chap. 335, Laws of 1873), vesting the power of appointment of commissioner of jurors in the mayor and common council, which made the office distinctively a city one, whatever had been its previous character, is embraced in the subject expressed in the title of the act, and so not in conflict with section 16 of article 3 of the State Constitution; and an appointment to the office in accordance with the provisions of said act of 1873 was valid. *Id.*

JUSTICE'S COURT.

1. A court of a justice of the peace has no power to adjudge a person in contempt and to punish him

therefor, save in the cases prescribed by statute. (ANDREWS and MILLER, JJ., dissenting.) *Rutherford* v. *Holmes*. 368

2. In order to give such court jurisdiction to punish a witness for contempt for refusing to answer a proper and pertinent question, there must be an oath of the party, at whose instance he attended, of the materiality of the testimony (2 R. S., 274, § 279), and a justice is liable in an action for false imprisonment, at the suit of one imprisoned under and in pursuance of his warrant of commitment for such a contempt, where it does not appear in the warrant or by the evidence that such an oath was made. (ANDREWS and MILLER, JJ., dissenting.) *Id.*

3. It is immaterial that the witness was a party sworn in his own behalf, that the question he refused to answer was asked upon cross-examination and that it was therefore impossible to meet the requirements of the statute; this does not authorize a disregard of it. (ANDREWS and MILLER, JJ., dissenting.) *Id.*

4. *It seems* that in case of such refusal to answer, the remedy of the opposite party is to move to strike out the direct-examination. *Id.*

LACHES.

—— *When it will not defeat right of action.*
See McMurray v. *McMurray*, 175.

LANDLORD AND TENANT.

See SUMMARY PROCEEDINGS.

LEASE.

1. Where a mortgage is of a leasehold interest, and in the notice of sale under judgment of foreclosure the lease is referred to, a purchaser is chargeable with knowledge of the contents of the lease, and is supposed to have made his bid in view of its provisions. *Rigg* v. *Purcell*. 126

2. A lease contained a covenant on the part of the lessee that he would not, during the term, assign, transfer or set over the lease or the term thereby created. A purchaser at a sale upon foreclosure of a mortgage given by the lessee upon the leasehold interest claimed that this covenant had been violated by giving the mortgage, and the lease thereby forfeited. It appeared that the lessors made no objection and were willing to assent if it was required. There was no proof that they had declared or claimed a forfeiture or that the purchaser had applied for their assent. They had received rents after the giving the mortgage with knowledge thereof. The mortgage was given two years before the sale, which was publicly advertised. *Held*, that under the circumstances there was no forfeiture. *Id.*

3. *It seems*, that the giving of the mortgage was not a violation of the covenant, as it was not a transfer of the title or possession; nor was the foreclosure sale a breach, as it was a sale *in invitum*. *Id.*

4. The lease contained a covenant that the lessee would, within two years from the commencement of the term, erect buildings on a portion of the demised premises worth at least $75,000, which was not done. This was known to the purchaser at the time of the purchase. The lessors, knowing the facts, had sued to recover rent without claiming forfeiture, and it did not appear that they had ever claimed any forfeiture; it appeared by affidavits on part of plaintiffs that the purchasers were aware that the lessors were willing to extend the time, and had so extended it. *Held*, that no forfeiture on this account appeared; and that it did not defeat the sale. *Id.*

5. Parties formerly owning the leased lands and other lands on both sides of Twenty-second street entered into an agreement that the buildings thereafter erected thereon,

fronting on said street, should be placed back seven feet six inches from the street, so as to have a court-yard in front of the premises, and the houses had been built in conformity to the agreement, including one on that portion of the leasehold premises affected. There was no proof or allegation that this agreement diminished the value of the premises. *Held* (MILLER, J., dissenting), that while this agreement was in one sense an incumbrance upon the premises, it could not be assumed, without proof, that it injuriously affected their value; and as it was manifest that the purchasers would have bid the same had they known of the agreement, it was an immaterial defect, which the court would disregard. *Id.*

6. In the said agreement was a covenant that the owners should not permit to be erected or carried on upon their respective premises any building or business generally classed as nuisances or dangerous or offensive. A similar covenant of the lessee was contained in the lease. *Held*, that the covenant in the agreement was for the benefit of all the lots, and it could not be inferred that it injured the value of any of them; and as essentially the same covenant was in the lease, this was no ground for relief. *Id.*

—— *What will not amount to forfeiture under; and as to mortgage of leasehold interest.*

See Riggs v. *Purcell*, 198.

—— *Clauses in as to placing signs construed.*

See Knoepfel v. *K. C. F. Ins. Co.* (Mem.), 639.

LEGACY.

—— *When surrogate's order directing payment of before settlement of executor's account improper.*

See Gilman v. *Gilman* (Mem.), 631.

LICENSE.

Although a railroad company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track, nor will a departure in some degree or particular by its employes from the ordinary course of procedure make it liable for an injury resulting therefrom unless it involved the doing of an act which might reasonably be anticipated would result in injury to a person lawfully on the track under the license. The licensees acting under it take the risks incident to the business. *Sutton* v. *N. Y. C. and H. R. R. R. Co.* 243

LIENS.

See MECHANIC'S LIEN.

—— *When bequest is a lien on real estate.*

See Thurber v. *Chambers*, 42.

LIMITATION OF ACTIONS.

1. The delivery by a debtor to a creditor of a promissory note of a third person, as collateral security, for, or as conditional payment, in part, of his debt, is equally an acknowledgment of liability for the whole debt, as would be an absolute payment, and is equally effectual to suspend the operation of the statute of limitations. *Smith* v. *Ryan.* 352

2. It is, however, only evidence of an acknowledgment and promise to pay at the time of the delivery of the note, not at the time of its maturity or when it is paid by the maker; the latter is not constituted agent of the debtor to renew the promise by payment, whether made at maturity or afterwards, and the statute begins to run from the time of the delivery. *Id.*

MACHINERY.

—— *When considered as fixtures.*

See McRea v. *C. N. Bank*, 439.

MALICIOUS PROSECUTION

1. Although in an action for malicious prosecution it appears that the apparent facts were such that a discreet and prudent person might have been led in a belief that plaintiff was guilty of the crime for which he was prosecuted by defendant, yet if it appear that the latter had knowledge of facts which would explain the suspicious appearances and exculpate plaintiff, he cannot justify the prosecution by putting forth the *prima facie* circumstances, and excluding those that within his knowledge tending to prove innocence. *Payne v. Kent.* 336

2. Plaintiff had been for many years confidential managing clerk for defendant, having charge of the money drawer and control and supervision over the employes, including the cashier. Upon examining his account it appeared that some items charged to him upon a pass-book, kept by the cashier, had not been transferred to the cash-book kept by plaintiff, and a larger number of charges upon the latter book had not been transferred to the ledger. There was also an erasure and some false additions in favor of plaintiff. Defendant caused plaintiff's arrest for embezzlement. In an action for malicious prosecution, the evidence tended to show that plaintiff admitted the correctness of the account as made up by the examiner and settled with defendant by conveying to him certain real estate, the latter giving a general release. Plaintiff testified that he kept a private memorandum-book which explained the apparent discrepancies in showing sums of money loaned by him from time to time to defendant, which he deducted from the sums charged to him, and carried the balance only into the ledger account; that this account for loans was adjusted once a year; that when defendant spoke to him of the discrepancies, he produced the memorandum-book, which defendant examined, and requested permission to take, this was granted, but defendant afterward refused to produce it, and denied all knowledge of it; that he settled with plaintiff through fear of prosecution by leaving the latter and approving his note evidence. All the witnesses contradicted by the defendant. *Held*, that upon the facts established by plaintiff's testimony there was no want of probable cause, yet his testimony if considered strongly to show malice on the part of defendant, so justified a finding of malicious prosecution; and that the question as to its credibility was one of fact for the jury. R

2. The court charged in substance that if defendant, prior to making complaint against plaintiff, settled for the moneys claimed to have been embezzled as for moneys had and received, this would be evidence that he did not believe plaintiff had embezzled the moneys. *Held* error; that if money was embezzled, defendant had a right to settle as for a debt upon an implied contract, and such settlement was no bar to a criminal prosecution; nor did it furnish evidence that defendant did not believe the money had been embezzled. R

4. It was urged, in answer to the exception to the charge, that the moneys received by plaintiff were not intrusted to him as agent, but were received from the cashier. *Held*, first, that money paid by the cashier to plaintiff by his direction was the same as if taken by himself from the drawer or safe, as he had charge of all the money; second, that the charge did not embrace this point. R

MANDAMUS.

1. To entitle a party to a writ of *mandamus*, he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ is directed; also, that such person still has it in his power to perform the duty required. *People ex rel. v. Stevens.* 606

2. So, also, whatever is required to be done by the relator as a condition precedent to the right demanded, must be shown affirmatively to have been performed by him before he is entitled to the writ. *Id.*

MARINE COURT (NEW YORK CITY).

1. The legislature has authority to confer upon the Marine Court of the city of New York whatever civil or criminal jurisdiction it deems best, subject only to the restriction that its character as a local court shall be preserved. (Const., art. 6, § 19.) *Anderson* v. *Reilly*. 189

2. It may confer jurisdiction in actions of assault and battery, without limit as to the amount of the claim or recovery. *Id.*

3. The provision of the Marine Court act of 1872 (§ 3, sub. 12, chap. 629, Laws of 1872) providing that any court of record in the city and county of New York shall have power to send any action of assault and battery, etc., brought therein, to the Marine Court for trial, and giving the Marine Court jurisdiction of such action, as comprehensive as that of the court transferring it, although ineffectual to authorize a compulsory transfer, yet may have effect where the parties consent thereto, and the act may be read as if this condition were inserted. *Id.*

4. The Marine Court of the city of New York has no jurisdiction of an action against the city corporation. *Callahan* v. *The Mayor*. 656

5. The provisions of the acts of 1860 (chap. 379, Laws of 1860) and 1868 (chap. 853, Laws of 1868), giving to the Supreme Court of the first judicial district, the Court of Common Pleas for the city and county, and the Superior Court of the city, exclusive jurisdiction in all actions where the city corporation is a party defendant, are not repealed or affected by the provision of the act of 1872, relating to the Marine Court (sub. 15, § 2, chap. 629, Laws of 1872), which gives to said court jurisdiction of actions against corporations created under the laws of this State, and having an office or transacting business in the city of New York; that provision is only applicable to private corporations. *Id.*

6. The appearance and answer, by attorney for defendant, in an action brought in the Marine Court against the corporation of the city of New York, is not a waiver of the question of jurisdiction, and does not confer jurisdiction. *Id.*

MANUFACTURING CORPORATIONS.

1. After the charter of a manufacturing corporation had expired by statutory limitation, its general agent appointed during the existence of the corporation continued to carry on the business and to contract debts; and for such a debt he gave a promissory note in the name of the corporation. In an action against the stockholders seeking to charge them as makers of the note, on the ground that there was an implied contract of copartnership between them, it appeared that defendants, six months after the expiration of the charter, received dividends as from the earnings of the corporation, but without notice that it was not so paid, and without knowledge of the expiration of the charter; also, that credit was not given to them as partners or individuals, but to the supposed corporation. *Held*, that upon the expiration of the charter, the title to the corporate property vested in the trustees then in office, in trust for the creditors and stockholders (1 R. S., 600, § 1); that the defendants being merely *cestuis que trust*, could not, without other evidence than proof of their interest, be charged as copartners, and that if they had received any part of the earnings of the business carried on after the corporation ceased to exist, this did not make them liable in an

jury, was error. *I. L. I. and T. Co.* v. *F. F. I. and T. Co.* 119

2. In an action upon an alleged contract of fire insurance, plaintiff's evidence tended to show that he had insured with defendant for many years, and had been in the habit of getting policies without paying premiums at the time. That plaintiff called upon defendant's secretary September 6, 1871, in reference to insurance upon a hotel on which defendant then had a policy, and endeavored to get it insured at a less rate. The agent replied that he would insure it at the old rate, no less. To which plaintiff replied, "very well, I must have it insured The defendant made out a pol the next day, dating it the si On the ninth, plaintiff called asked the secretary if he had the building. That officer of that he had, at the old pr un- October sixteenth, plair posed called to get insuranc ne peril property, and told a ea greatly fendant's (the secret el sprang a in) that he had anot' as abandoned. would pay for alled as experts, The clerk repli the unusual The hotel was that was a fact seventh. Plai the risk. *Held*, that day, informe erred in submitting the loss, and off materiality to the policies, b the risk was not that to accept against, and the policy in suit, *Id.* to be li attached. vacan plair sec w c

3. The statement in a policy of marine insurance of the ultimate and intermediate *termini* of the voyage does not prohibit stopping at other intermediate ports, which, by the course of navigation, or the usage of trade, are usually entered in making the insured voyage. *McCall* v. *S. M. Ins. Co.* 505

4. In the absence of words excluding it, the course of navigation prescribed by usage may, and indeed must, be pursued. *Id.*

5. Defendant issued a policy insuring the bark L. "at and from Miramichi to a port in Cape Breton, and at and from thence to New York, with privilege of time it was issued was unoccupied. clause was a w house was occu and that it there was ranty whi *Alexander*

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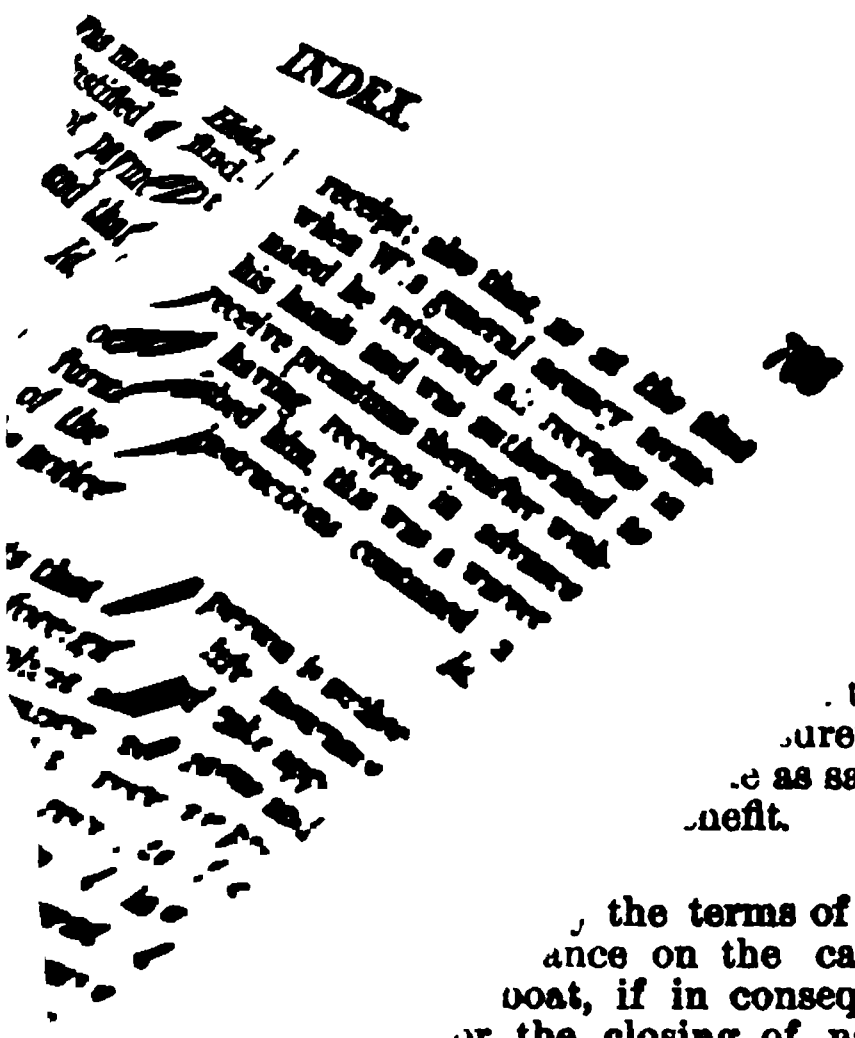

ad 2. In such case, where judgment is obtained by fraud and collusion, an action may be maintained on part of the infant to set it s to him. *Id.*

ent taken by default in proceedings for non- nt of rent, until reversed, side or vacated, is conclusive any action by the landlord against the tenant to recover the rent, of the facts alleged in the affidavit, and which are required by the statute to be alleged as the basis of the proceedings, to wit: the tenancy, the acceptance by the the tenant, the non-payment of rent due, and the holding over after default in payment. *Brown* v. *The Mayor.* 385

4. Where a motion to vacate a judgment taken by default is made both on the ground of mistake, inadvertence, surprise or excusable neglect, and also on the ground of fraud, and the facts warrant the granting of the motion on the latter ground, it will be presumed, on appeal from an order of General Term, affirming an order granting the motion, as against an objection, that the order was granted more than a year after notice of judgment, and so was improper under section 174 of the Code; that the order was granted on the ground of fraud, and the limitation of said section does not apply. *Dinsmore* v. *Adams.* 618

—— *In action to set aside fraudulent conveyance.*

See Young v. *Heermans*, 874.

—— *In action at law against a co-surety for contribution.*

See Easterly v. *Barber*, 433.

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the terms of a policy ance on the cargo of a oat, if in consequence of or the closing of navigation e voyage cannot be finished the same season, the risk is to terminate at the time the voyage shall be stopped, three days being given to discharge the cargo, the insured has the right to make every effort to continue the voyage, notwithstanding it be apparent that it can not be completed by reason of ice; the actual stoppage, is the time from which the three days for discharging are to be computed, and mere delays, coupled with the impossibility of completing the entire voyage, do not show actual stoppage; the voyage can only be stopped by act of the master or causes making further progress impossible. The insured has also the right, although there are obstructions by ice, to continue the voyage to a proper place to discharge the cargo and lay up the boat for winter. *Sherwood* v. *M. M. Ins. Co.* 630

JUDGMENT.

1. Where an infant defendant in an action for foreclosure is served with process, but no guardian *ad litem* is appointed, and judgment is taken by default, the judgment is not void, but voidable. *McMurray* v. *McMurray.* 175

JUDICIAL SALES.

1. A purchaser at a mortgage foreclosure sale will not be relieved on account of apparent defects in the property, or of defects in the title of which he had notice, and in reference to which he made his bid. *Riggs* v. *Purcell.* 193

2. Immaterial defects and merely technical objections will not de-

2. In actions upon marine insurance the testimony of underwriters as experts is admissible upon the question of materiality of circumstances affecting the risk, and where evidence of this kind is necessary for the reason that the fact is not sufficiently obvious to enable the court to decide it without such aid, the testimony is to be treated the same as that in reference to any other fact, and if there is no conflict the fact of materiality or immateriality must be held as the witnesses testify. *Id.*

3. In an action upon a policy of marine insurance covering a quantity of gold coin it appeared that the coin was not stowed in or under the captain's cabin, the usual places for stowing freight of that description, but in the "run," under the cargo and ballast. This was without the knowledge of defendant. The evidence was undisputed that it was thus exposed to a different risk and the peril in case of disaster at sea greatly increased. The vessel sprang a leak at sea and was abandoned. Underwriters, called as experts, all testified that the unusual method of stowage was a fact material to the risk. *Held*, that the court erred in submitting the question of materiality to the jury; that the risk was not that insured against, and the policy never attached. *Id.*

4. The statement in a policy of marine insurance of the ultimate and intermediate *termini* of the voyage does not prohibit stopping at other intermediate ports, which, by the course of navigation, or the usage of trade, are usually entered in making the insured voyage. *Mc Call* v. *S. M. Ins. Co.* 505

5. In the absence of words excluding it, the course of navigation prescribed by usage may, and indeed must, be pursued. *Id.*

6. Defendant issued a policy insuring the bark L. "at and from Miramichi to a port in Cape Breton, and at and from thence to New York, with privilege of carrying coal," etc. The vessel had previously sailed from the port of departure to Big Glace bay, a port in Cape Breton, under a charter to load with coal, containing a provision that if, on arrival, the captain should not consider it safe to remain and load, he was at liberty to proceed elsewhere, in which case the charter was to be considered canceled. Big Glace bay is exposed to the sea, affording no protection from winds and storms, and it is the usual custom for vessels bound to Big Glace bay for coal, during the fall and winter months, to first stop at Sydney, a port in Cape Breton having a good harbor, first reached on a voyage from Miramichi, and when their masters are notified that the vessels can be loaded, to proceed to the port of lading. This custom was established for the safety of vessels. The L. arrived at Sydney November twelfth; the next day her master went to Big Glace bay, and finding no wharf, concluded it an unsafe place to load and went to Cow bay, another port in Cape Breton having a substantial wharf, and there entered into a charter to load with coal for New York, on December twelfth. As soon as her turn to load arrived the L. sailed to Cow bay, and while loading was driven upon the rocks and injured. In an action upon the policy, *held*, that the vessel, by stopping at Sydney, did not exhaust the privilege given in the policy, nor was it a deviation; that the vessel was free to choose any customary coaling port on the island, and in going to the selected port to make the voyage in the usual and customary manner; that therefore the privilege of the policy was not exhausted by going into Sydney for safe anchorage according to usual custom; also, that the reservation in the first charter of the right to cancel it, made it uncertain what the actual voyage would be, and it could only be made certain when the master should elect to what port of lading he would go, which election was made at Sydney, in the direct course of a voyage to the port selected, so that there was no deviation. *Id.*

7. *It seems*, that if the master had elected, in the first instance, to go to Big Glace bay, and had first gone to that port and then sailed for Cow bay, his privilege under the policy would have been exhausted, as an election once made determines the right. *Id.*

8. The mere fact that an insured vessel exists in specie, does not necessarily prevent the insured from claiming a total loss without abandonment. If after encountering a sea peril it is, for that reason, justifiably sold by the master, the insured may claim a total loss, accounting to the insurer for the proceeds of the sale as salvage received for his benefit. *Id.*

9. Where, by the terms of a policy of insurance on the cargo of a canal boat, if in consequence of ice or the closing of navigation the voyage cannot be finished the same season, the risk is to terminate at the time the voyage shall be stopped, three days being given to discharge the cargo, the insured has the right to make every effort to continue the voyage, notwithstanding it be apparent that it can not be completed by reason of ice; the actual stoppage, is the time from which the three days for discharging are to be computed, and mere delays, coupled with the impossibility of completing the entire voyage, do not show actual stoppage; the voyage can only be stopped by act of the master or causes making further progress impossible. The insured has also the right, although there are obstructions by ice, to continue the voyage to a proper place to discharge the cargo and lay up the boat for winter. *Sherwood* v. *M. M. Ins. Co.* 630

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1. Where an infant defendant in an action for foreclosure is served with process, but no guardian *ad litem* is appointed, and judgment is taken by default, the judgment is not void, but voidable. *McMurray* v. *McMurray*. 175

2. In such case, where judgment is obtained by fraud and collusion, an action may be maintained on the part of the infant to set it aside as to him. *Id.*

3. A judgment taken by default in summary proceedings for non-payment of rent, until reversed, set aside or vacated, is conclusive in any action by the landlord against the tenant to recover the rent, of the facts alleged in the affidavit, and which are required by the statute to be alleged as the basis of the proceedings, to wit: the tenancy, the acceptance by the the tenant, the non-payment of rent due, and the holding over after default in payment. *Brown* v. *The Mayor*. 385

4. Where a motion to vacate a judgment taken by default is made both on the ground of mistake, inadvertence, surprise or excusable neglect, and also on the ground of fraud, and the facts warrant the granting of the motion on the latter ground, it will be presumed, on appeal from an order of General Term, affirming an order granting the motion, as against an objection, that the order was granted more than a year after notice of judgment, and so was improper under section 174 of the Code; that the order was granted on the ground of fraud, and the limitation of said section does not apply. *Dinsmore* v. *Adams*. 618

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9. Defendant's evidence tended to show that it was to make repairs when notified by D. that repairs were necessary. The court charged that if this were so and no notice was given, if the agreement was not known to plaintiff and the accident occurred from neglect to repair without negligence on the part of plaintiff, defendant was liable, *held*, error. *Id.*

10. Although a railroad company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track, nor will a departure in some degree or particular by its employes from the ordinary course of procedure make it liable for an injury resulting therefrom unless it involved the doing of an act which might reasonably be anticipated would result in injury to a person lawfully on the track under the license; the licensees acting under it take the risks incident to the business. *Sutton* v. *N. Y. C. and H. R. R. R. Co.* 243

11. S., plaintiff's intestate, was employed in a foundry, the workmen in which had been accustomed to cross defendant's tracks at a certain point. It was defendant's daily custom to disconnect cars from trains backing down on the track nearest the foundry, which by their momentum would pass by the foundry, when a brakeman would apply the brakes. S. came out of the foundry as cars so disconnected were passing. They stopped just as the rear one passed the door. He stepped across the track, when his progress was arrested by a train approaching on the second track, and he stepped backward upon the track he had crossed, where he was struck and killed by the disconnected cars, which, in consequence of a slight down grade, the brakeman having failed to apply the brakes, had started of themselves slowly backward. No instance of a car thus running backward had ever been known before. In an action to recover damages, *held*, that a refusal of the court to charge that the defendant owed no duty to the deceased to set the brakes, or otherwise fasten the cars, was error; and that the evidence did not make out a cause of action. *Id.*

12. A municipal corporation can only be made liable for damages resulting from the overflow of a sewer upon proof of some fault or neglect upon its part, either in the construction of the sewer or in keeping it in proper repair. *Smith* v. *Mayor.* 295

13. In case there is no fault in the construction of the sewer, and the damage is caused by any obstruction therein, it is necessary to show neglect to remove the obstruction after notice of its existence, or some omission of duty upon the part of the municipal officers in looking after it and preventing obstructions. *Id.*

14. During, or just after, an unusually heavy shower, a sewer in one of defendant's streets overflowed and flooded plaintiff's premises. In an action to recover damages, it appeared that the overflow was caused by a stoppage of the sewer with sand, etc., washed in from the streets. There was no proof of any prior obstruction, or of any defect in the construction of the sewer. *Held*, defendant was not liable. *Id.*

15. Where there is no express exemption provided by contract, a railroad company is liable for the consequences of its own or its servants' negligence to persons traveling upon its trains, as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare. *Blair* v. *E. R. Co.* 313

16. One temporarily supplying the place of an express messenger stands in the same position with him, and is entitled to the same protection. *Id.*

mission. The cause of action does not arise upon contract, but is simply the infringement of a patent right, and so arises under the patent laws of the United States; the United States courts, therefore, have exclusive jurisdiction. (ALLEN, J., CHURCH, Ch. J., and EARL, J., concurring.) *De Witt* v. *E. N. M. Co.* 459

10. A plaintiff in an action, the subject-matter of which is within the jurisdiction of a court of a justice of the peace, cannot, by merely demanding judgment for a sum exceeding the jurisdiction of that court, oust it of jurisdiction, and thereby entitle himself to full costs in a superior court wherein he brings the action upon a recovery of a nominal sum; the recovery is conclusive of the amount in controversy, as affecting the question of costs. *Powers* v. *Gross.* 646

11. The Marine Court of the city of New York has no jurisdiction of an action against the city corporation. *Callahan* v. *The Mayor.* 656

12. The provisions of the acts of 1860 (chap. 379, Laws of 1860) and 1868 (chap. 853, Laws of 1868), giving to the Supreme Court of the first judicial district, the Court of Common Pleas for the city and county, and the Superior Court of the city, exclusive jurisdiction in all actions where the city corporation is a party defendant, are not repealed or affected by the provision of the act of 1872, relating to the Marine Court (sub. 15, § 2, chap. 629, Laws of 1872) which gives to said court jurisdiction of actions against corporations created under the laws of this State, and having an office or transacting business in the city of New York; that provision is only applicable to private corporations. *Id.*

13. The officers or agents of a municipal corporation cannot, by consent or omission to object, give to a court jurisdiction in an action against the corporation where the law has conferred elsewhere exclusive jurisdiction of actions against it. *Id.*

14. Accordingly *held*, that the appearance and answer, by attorney for defendant, in an action brought in the Marine Court against the corporation of the city of New York, was not a waiver of the question of jurisdiction, and did not confer jurisdiction. *Id.*

—— *Of Justice's Court to punish for contempt.*

See Rutherford v. *Holmes*, 368.

JURY.

1. The office of commissioner of jurors, created by the act of 1847, "in relation to jurors of the city of New York" (chap. 495, Laws of 1847), was not made thereby distinctively a county office, nor did the commissioners succeed to powers theretofore exercised by an officer of the county of New York. *People ex rel.* v. *Dunlap.* 162

2. Assuming, however, that it was a county office, it was a new office created by the act, the legislature had power subsequently to change its character from a county to a city office, and to provide for a different mode of appointment. *Id.*

3. The provision, therefore, of the act of 1873, "to reorganize the local government" (chap. 335, Laws of 1873), vesting the power of appointment of commissioner of jurors in the mayor and common council, which made the office distinctively a city one, whatever had been its previous character, is embraced in the subject expressed in the title of the act, and so not in conflict with section 16 of article 3 of the State Constitution; and an appointment to the office in accordance with the provisions of said act of 1873 was valid. *Id.*

JUSTICE'S COURT.

1. A court of a justice of the peace has no power to adjudge a person in contempt and to punish him

Parties formerly owning the land
herein and other lands on both sides
of Twenty-second street entered
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ings thereafter erected thereon,

fronting on said street, should be placed back seven feet six inches from the street, so as to have a court-yard in front of the premises, and the houses had been built in conformity to the agreement, including one on that portion of the leasehold premises affected. There was no proof or allegation that this agreement diminished the value of the premises. *Held* (MILLER, J., dissenting), that while this agreement was in one sense an incumbrance upon the premises, it could not be assumed, without proof, that it injuriously affected their value; and as it was manifest that the purchasers would have bid the same had they known of the agreement, it was an immaterial defect, which the court would disregard. *Id.*

6. In the said agreement was a covenant that the owners should not permit to be erected or carried on upon their respective premises any building or business generally classed as nuisances or dangerous or offensive. A similar covenant of the lessee was contained in the lease. *Held*, that the covenant in the agreement was for the benefit of all the lots, and it could not be inferred that it injured the value of any of them; and as essentially the same covenant was in the lease, this was no ground for relief. *Id.*

—— What will not amount to forfeiture under; and as to mortgage of leasehold interest.

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See Gilman v. *Gilman* (Mem.), 631.

LICENSE.

Although a railroad company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track, nor will a departure in some degree or particular by its employes from the ordinary course of procedure make it liable for an injury resulting therefrom unless it involved the doing of an act which might reasonably be anticipated would result in injury to a person lawfully on the track under the license. The licensees acting under it take the risks incident to the business. *Sutton* v. *N. Y. C. and H. R. R. R. Co.* 243

LIENS.

See MECHANIC'S LIEN.

—— When bequest is a lien on real estate.

See Thurber v. *Chambers*, 42.

LIMITATION OF ACTIONS.

1. The delivery by a debtor to a creditor of a promissory note of a third person, as collateral security, for, or as conditional payment, in part, of his debt, is equally an acknowledgment of liability for the whole debt, as would be an absolute payment, and is equally effectual to suspend the operation of the statute of limitations. *Smith* v. *Ryan.* 352

2. It is, however, only evidence of an acknowledgment and promise to pay at the time of the delivery of the note, not at the time of its maturity or when it is paid by the maker; the latter is not constituted agent of the debtor to renew the promise by payment, whether made at maturity or afterwards, and the statute begins to run from the time of the delivery. *Id.*

MACHINERY.

—— When considered as fixtures.

See McRea v. *C. N. Bank*, 409.

MALICIOUS PROSECUTION.

1. Although in an action for malicious prosecution it appears that the apparent facts were such that a discreet and prudent person might have been led to a belief that plaintiff was guilty of the crime for which he was prosecuted by defendant, yet if it appear that the latter had knowledge of facts which would explain the suspicious appearances, and exonerate plaintiff, he cannot justify the prosecution by putting forth the *prima facie* circumstances, and excluding those thus within his knowledge tending to prove innocence. *Fagnan* v. *Knox.* 526

2. Plaintiff had been for many years confidential managing clerk for defendant, having charge of the money drawer, and control and supervision over the employes, including the cashier. Upon examining his account it appeared that some items charged to him upon a petty cash-book, kept by the cashier, had not been transferred to the cash-book kept by plaintiff, and a larger number of charges upon the latter book had not been transferred to the ledger. There was also an erasure and some false additions in favor of plaintiff. Defendant caused plaintiff's arrest for embezzlement. In an action for malicious prosecution, the evidence tended to show that plaintiff admitted the correctness of the account as made up by the examiner and settled with defendant by conveying to him certain real estate, the latter giving a general release. Plaintiff testified that he kept a private memorandum-book which explained the apparent discrepancies, in showing sums of money loaned by him from time to time to defendant, which he deducted from the sums charged to him, and carried the balance only into the ledger account; that this account for loans was adjusted once a year; that when defendant spoke to him of the discrepancies, he produced the memorandum-book, which defendant examined, and requested permission to take, this was granted, but defendant afterward refused to produce it, and denied all knowledge of it; that he settled with plaintiff through fear of prosecution, believing the latter had suppressed his only evidence. All this was contradicted by the defendant. *Held*, that upon the facts unexplained by plaintiff's testimony, there was no want of probable cause, yet his testimony, if true, tended strongly to show bad faith on the part of defendant, and justified a finding of malicious prosecution; and that the question as to its credibility was one of fact for the jury. *Id.*

3. The court charged in substance that if defendant, prior to making complaint against plaintiff, settled for the moneys claimed to have been embezzled as for moneys had and received, this would be evidence that he did not believe plaintiff had embezzled the moneys. *Held* error; that if money was embezzled, defendant had a right to settle as for a debt upon an implied contract, and such settlement was no bar to a criminal prosecution; nor did it furnish evidence that defendant did not believe the money had been embezzled. *Id.*

4. It was urged, in answer to the exception to the charge, that the moneys received by plaintiff were not intrusted to him as agent, but were received from the cashier. *Held*, first, that money paid by the cashier to plaintiff by his direction was the same as if taken by himself from the drawer or safe, as he had charge of all the money; second, that the charge did not embrace this point. *Id.*

MANDAMUS.

1. To entitle a party to a writ of *mandamus*, he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ is directed; also, that such person still has it in his power to perform the duty required. *People ex rel.* v. *Stevens.* 606

2. So, also, whatever is required to be done by the relator as a condition precedent to the right demanded, must be shown affirmatively to have been performed by him before he is entitled to the writ. *Id.*

MARINE COURT (NEW YORK CITY).

1. The legislature has authority to confer upon the Marine Court of the city of New York whatever civil or criminal jurisdiction it deems best, subject only to the restriction that its character as a local court shall be preserved. (Const., art. 6, § 19.) *Anderson* v. *Reilly*. 189

2. It may confer jurisdiction in actions of assault and battery, without limit as to the amount of the claim or recovery. *Id.*

3. The provision of the Marine Court act of 1872 (§ 8, sub. 12, chap. 629, Laws of 1872) providing that any court of record in the city and county of New York shall have power to send any action of assault and battery, etc., brought therein, to the Marine Court for trial, and giving the Marine Court jurisdiction of such action, as comprehensive as that of the court transferring it, although ineffectual to authorize a compulsory transfer, yet may have effect where the parties consent thereto, and the act may be read as if this condition were inserted. *Id.*

4. The Marine Court of the city of New York has no jurisdiction of an action against the city corporation. *Callahan* v. *The Mayor*. 656

5. The provisions of the acts of 1860 (chap. 379, Laws of 1860) and 1868 (chap. 853, Laws of 1868), giving to the Supreme Court of the first judicial district, the Court of Common Pleas for the city and county, and the Superior Court of the city, exclusive jurisdiction in all actions where the city corporation is a party defendant, are not repealed or affected by the provision of the act of 1872, relating to the Marine Court (sub. 15, § 2, chap. 629, Laws of 1872), which gives to said court jurisdiction of actions against corporations created under the laws of this State, and having an office or transacting business in the city of New York; that provision is only applicable to private corporations. *Id.*

6. The appearance and answer, by attorney for defendant, in an action brought in the Marine Court against the corporation of the city of New York, is not a waiver of the question of jurisdiction, and does not confer jurisdiction. *Id.*

MANUFACTURING CORPORATIONS.

1. After the charter of a manufacturing corporation had expired by statutory limitation, its general agent appointed during the existence of the corporation continued to carry on the business and to contract debts; and for such a debt he gave a promissory note in the name of the corporation. In an action against the stockholders seeking to charge them as makers of the note, on the ground that there was an implied contract of copartnership between them, it appeared that defendants, six months after the expiration of the charter, received dividends as from the earnings of the corporation, but without notice that it was not so paid, and without knowledge of the expiration of the charter; also, that credit was not given to them as partners or individuals, but to the supposed corporation. *Held*, that upon the expiration of the charter, the title to the corporate property vested in the trustees then in office, in trust for the creditors and stockholders (1 R. S., 600, § 1); that the defendants being merely *cestuis que trust*, could not, without other evidence than proof of their interest, be charged as copartners, and that if they had received any part of the earnings of the business carried on after the corporation ceased to exist, this did not make them liable in an

action at law upon the contracts made by the agent; nor did it amount to a ratification of his acts. *C. C. S. Bk.* v *Walker.* 424

2. Also, *held*, that there was no legal distinction in respect to liability between a trustee and a simple stockholder where neither contracted the debt or authorized another to represent him in the transaction. *Id.*

MECHANIC'S LIEN.

1. The special mechanics' lien law of 1865 for the county of Rensselaer (chap. 778, Laws of 1865) was not repealed by the act of 1869 (chap. 558, Laws of 1869) amending the general lien law of 1854 (chap. 402, Laws of 1854). Assuming that said act of 1865 was by implication repealed by the act of 1869, it was restored by the act of 1870 (chap. 194, Laws of 1870) exempting the county of Rensselaer from the operation of said act of 1869. *Van Denburgh* v. *President, etc.* 1

2. Accordingly, *held*, that a notice of lien in said county was properly filed in the office of the town clerk, not of the county clerk. *Id.*

3. By the terms of a building contract between defendant, owner, and B., contractor, it was provided that if, during the progress of the work, the contractor refused or neglected to supply sufficient materials or workmen, defendant, after three days' notice, might provide them to finish the work, and deduct the expense from the amount of the contract. Defendant, on the default of B., gave the three days' notice, and thereafter expended, in labor and material to complete the work a sum which, with the amount paid B., was $778.90 less than the contract-price. In an action to foreclose a mechanic's lien for materials for the building sold B., *held*, that defendant, by electing to go on under said clause in the contract, waived the right to insist upon a forfeiture; and that plaintiff was entitled to judgment for the balance unpaid. *Murphy* v. *Dunkman.* 297

——*When not affected by cancellation of building contract.*
See Jones v. *Brown* (Mem.), 629.

MILITARY SERVICE.

1. The business of furnishing recruits during the war of the rebellion was a lawful one, and the members of a partnership formed for that purpose had a right to agree, in their articles of copartnership, that they would not come in competition with each other, or furnish recruits for less than a price fixed. *Marsh* v. *Russell.* 288

2. Such an agreement can only be condemned on proof that it was made as part of a conspiracy to control prices or create a monopoly, and so against public policy, or that it was made for some other unlawful purpose. *Id.*

MISTAKE.

Where a person who, through the negligence of another, has received an injury which, without a surgical operation, would cause his death, employs a competent and skillful surgeon, by whose mistake the operation is not successful, and the patient dies, the wrongdoer is not shielded from liability by the surgeon's error; and this, although the operation is the immediate cause of the death. *Sauter* v. *N. Y. C. and H. R. R. R. Co.* 50

——*When action to recover back moneys paid by; not maintainable.*
See K. Bk. v. *Ettinge* (Mem.), 625.

MORTGAGE.

1. A purchaser, at a legal tax sale, of land upon which there is at the time a mortgage duly recorded, upon receipt of the comptroller's deed, acquires a valid title, subject to the right of the mortgagee to redeem under the statute. (Chap.

427, Laws of 1855, § 76, *et seq.* *Becker* v. *Howard.* 5

2. The mortgagee may, at any time within six months after receiving notice of sale, redeem; but he is not compelled to await the reception of such notice before redeeming. *Id.*

3. The purchaser at the tax sale is not compelled to give any notice to the mortgagee in order to perfect his title. He can, however, only limit the time for redemption by giving notice. *Id.*

4. A purchaser at such a sale is not affected by a subsequent foreclosure of the mortgage and sale of the mortgaged premises, where he is not made a party to the foreclosure. *Id.*

5. A payment upon a bond and mortgage made by the mortgagor to the mortgagee, after an assignment thereof by the latter, when made in good faith, without notice, actual or constructive, of the assignment, is valid. *Van Keuren* v. *Corkins.* 77

6. The fact that payment was made before due is no evidence of bad faith; nor is a want of good faith to be inferred from the facts that the bond and mortgage were not produced and payment indorsed thereon when made; or were not produced when payment in full was made, and satisfaction of the mortgage executed, or that no inquiries were made in regard to them; a failure to produce the instruments is not sufficient to put the mortgagor upon inquiry. *Id.*

7. A receipt given by the mortgagee at the time of payment is proper evidence in an action by an assignee, as part of the *res gestæ.* *Id.*

8. Where a mortgage which has been assigned, but the assignment not recorded, is satisfied of record by the mortgagee, a subsequent mortgagee is a "subsequent purchaser," within the recording act (1 R. S., 762, §§ 87, 88); and as to him the assignment is void. *Id.*

9. One who, either with or without notice of a prior unrecorded mortgage, takes a mortgage or conveyance of land as security for an existing debt, without giving up any security or divesting himself of any right, or doing any act to his own prejudice, on the faith of the title, is not a *bona fide*, purchaser for value within the meaning of the recording act (1 R. S., 756, § 1), and as against him the prior mortgage is valid. *De Lancey* v. *Stearns.* 157

10. An assignee, for value, of the subsequent mortgage, or grantee for value, claiming under the subsequent deed, stands in no better position than the mortgagee or original grantee. *Id.*

See FORECLOSURE.

——— *When machinery is held under, as fixtures.*
See McCrea v. *C. N. Bank,* 489.

MOTIONS AND ORDERS.

1. An order of General Term affirming an order of Special Term reviving against his executors a special proceeding instituted against a discharged trustee, and pending at his death, is not appealable to this court; it is not "a final order affecting a substantial right made in a special proceeding" within section 11 of the Code (sub. 3), but an intermediate order relating to the procedure. *In re Whittlesey* v. *Hoguet.* 358

2. Where a motion to vacate a judgment taken by default is made both on the ground of mistake, inadvertence, surprise or excusable neglect, and also on the ground of fraud, and the facts warrant the granting of the motion on the latter ground, it will be presumed, on appeal from an order of General Term, affirming an order granting the motion, as against an objection, that the order was granted more than a year after notice of judgment, and so was improper under section 174 of the Code; that the order was granted on the ground of fraud, and the limita-

tion of said section does not apply. *Dinsmore* v. *Adams.* 614

8. Such an order is not reviewable here. *Id.*

MUNICIPAL CORPORATIONS.

1. A municipal corporation can only be made liable for damages resulting from the overflow of a sewer upon proof of some fault or neglect upon its part, either in the construction of the sewer or in keeping it in proper repair. *Smith* v. *The Mayor, etc.* 295

2. In case there is no fault in the construction of the sewer, and the damage is caused by any obstruction therein, it is necessary to show neglect to remove the obstruction after notice of its existence, or some omission of duty upon the part of the municipal officers in looking after it and preventing obstructions. *Id.*

3. During, or just after, an unusually heavy shower, a sewer in one of defendant's streets overflowed and flooded plaintiff's premises. In an action to recover damages, it appeared that the overflow was caused by a stoppage of the sewer with sand, etc., washed in from the streets. There was no proof of any prior obstruction, or of any defect in the construction of the sewer. *Held*, defendant was not liable. *Id.*

4. As to whether, when the absolute duty is imposed by law upon a city to construct and keep in repair the sidewalks therein, it is not liable for injuries resulting from the improper construction of a sidewalk, although the work was done in accordance with the directions of its common council, *quære*. *Clemence* v. *City of A.* 334

5. In an action to recover damages for injuries sustained by plaintiff from falling upon a sidewalk on one of defendant's streets, plaintiff's evidence tended to show that a sidewalk had been laid at a grade fixed, that in consequence of the raising of an intersecting street a new grade was necessary and had been fixed by the common council. A portion of the walk was built upon the new grade, and where the old and the new walks came together there was a difference of several inches in the height; the chairman of the street committee of the common council directed that a stone, to join the old and new walks, be laid at a slope of six inches, in about three feet and a half, an angle much greater than that on either side; upon this stone plaintiff slipped and fell. The stone had been suffered to remain several years; similar casualties had occurred, and the evidence tended to show that it was unsafe for persons passing over it, whose attention was not particularly called to the difference. The court directed a nonsuit, on the ground that the common council acted judicially in establishing the grade, and the sidewalk having been built in conformity therewith, defendant was not liable; *held*, error; that it could not be assumed that the chairman of the street committee was authorized to change the grade, or that it was changed by direction of the common council; that the injury was not in consequence of any action of the common council establishing a grade, but resulted from the manner of constructing the sidewalk in violation of the requirements of the common council, and the cause of action, if any, was for neglect to remedy the defect; that if the walk was, in fact, in an unsafe condition, defendant was liable; and that that question was, upon the evidence, one of fact for the jury. *Id.*

6. A municipal corporation seeking to affect property within its jurisdiction by taxation, or proceedings in the nature thereof, must produce express power therefor in legislative enactment, and must show that it has strictly followed all the legal requirements. *In re Second Ave. M. E. Church.* 395

7. The officers or agents of a municipal corporation cannot, by consent or omission to object, give to a

court jurisdiction in an action against the corporation where the law has conferred elsewhere exclusive jurisdiction of actions against it. *Callahan* v. *The Mayor.* 656

—— *Taking of lands by, or easements therein, for public purposes.*

See in re R. W. Comrs., 413.

—— *Charter of village of Catskill, as to taking of lands for street purposes and as to taxation, construed.*

See Dodge v. *Village of C.* (Mem.), 642.

NEGLIGENCE.

1. A female who has accepted an invitation to take a ride with a person in every way competent and fit to manage a horse, is not chargeable with his negligence, and contributory negligence upon his part is no defence to an action against a railroad corporation for injuries resulting from a collision. *Robinson* v. *N. Y. C. and H. R. R. R. Co.* 11

2. Accordingly, *held*, that a charge in such an action that if defendant was negligent and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence, which contributed to the injury, was proper. *Id.*

3. Where a person who, through the negligence of another, has received an injury which, without a surgical operation, would cause his death, employs a competent and skillful surgeon, by whose mistake the operation is not successful, and the patient dies, the wrongdoer is not shielded from liability by the surgeon's error, and this, although the operation is the immediate cause of death. *Sauter* v. *N. Y. C. and H. R. R. R. Co.* 50

4. The sudden jerking of a railroad train backward while passengers are rightfully passing out of the cars is liable to produce accidents, and is negligence. *Id.*

5. In an action to recover damages for negligently causing the death of another, the Northampton tables are competent evidence to show the probable duration of life of the deceased, which is an element in estimating damages. *Id.*

6. An owner of real property is not liable for injuries resulting from negligence on the part of a contractor or his employe engaged in performing a lawful contract for specific work upon the premises. The law will not impute to one person the negligent act of another unless the relation of master and servant exists. *King* v. *N. Y. C. and H. R. R. R. Co.* 181

7. Where the owner of an instrument or piece of machinery not in its nature dangerous allows another person competent to manage it to take and use it, and while in the possession and use of the other it becomes defective and injures a third person, the owner is not liable, and the fact that the right to use it was given under a contract by which it was to be used in performing work for the owner upon his premises does not change his liability. *Id.*

8. One D, contracted with defendant to unload from vessels on to cars all the railroad iron brought to the dock at A. for a specified time and for a specified price, defendant to furnish a derrick to be used for the purpose. Defendant furnished a derrick suitable and safe at the time for use. Plaintiff was employed by D. to assist and was injured by a fall of the derrick. In an action to recover damages for the injury, *held*, that if D. was chargeable with negligence in omitting to inspect and repair the derrick, defendant was not responsible therefor; that in the absence of a contract to that effect no duty on the part of defendant to keep the derrick in repair could be implied; that the rule requiring a master to furnish safe and suitable machinery for the use of his servants did not apply, as plaintiff was not the servant of defendant; and that therefore a charge that in the absence of a special agreement defendant was bound to keep the derrick in repair, was error. *Id.*

9. Defendant's evidence tended to show that it was to make repairs when notified by D. that repairs were necessary. The court charged that if this were so and no notice was given, if the agreement was not known to plaintiff and the accident occurred from neglect to repair without negligence on the part of plaintiff, defendant was liable, *held*, error. *Id.*

10. Although a railroad company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track, nor will a departure in some degree or particular by its employes from the ordinary course of procedure make it liable for an injury resulting therefrom unless it involved the doing of an act which might reasonably be anticipated would result in injury to a person lawfully on the track under the license; the licensees acting under it take the risks incident to the business. *Sutton* v. *N. Y. C. and H. R. R. R. Co.* 243

11. S., plaintiff's intestate, was employed in a foundry, the workmen in which had been accustomed to cross defendant's tracks at a certain point. It was defendant's daily custom to disconnect cars from trains backing down on the track nearest the foundry, which by their momentum would pass by the foundry, when a brakeman would apply the brakes. S. came out of the foundry as cars so disconnected were passing. They stopped just as the rear one passed the door. He stepped across the track, when his progress was arrested by a train approaching on the second track, and he stepped backward upon the track he had crossed, where he was struck and killed by the disconnected cars, which, in consequence of a slight down grade, the brakeman having failed to apply the brakes, had started of themselves slowly backward. No instance of a car thus running backward had ever been known before. In an action to recover damages, *held*, that a refusal of the court to charge that the defendant owed no duty to the deceased to set the brakes, or otherwise fasten the cars, was error; and that the evidence did not make out a cause of action. *Id.*

12. A municipal corporation can only be made liable for damages resulting from the overflow of a sewer upon proof of some fault or neglect upon its part, either in the construction of the sewer or in keeping it in proper repair. *Smith* v. *Mayor.* 295

13. In case there is no fault in the construction of the sewer, and the damage is caused by any obstruction therein, it is necessary to show neglect to remove the obstruction after notice of its existence, or some omission of duty upon the part of the municipal officers in looking after it and preventing obstructions. *Id.*

14. During, or just after, an unusually heavy shower, a sewer in one of defendant's streets overflowed and flooded plaintiff's premises. In an action to recover damages, it appeared that the overflow was caused by a stoppage of the sewer with sand, etc., washed in from the streets. There was no proof of any prior obstruction, or of any defect in the construction of the sewer. *Held*, defendant was not liable. *Id.*

15. Where there is no express exemption provided by contract, a railroad company is liable for the consequences of its own or its servants' negligence to persons traveling upon its trains, as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare. *Blair* v. *E. R. Co.* 313

16. One temporarily supplying the place of an express messenger stands in the same position with him, and is entitled to the same protection. *Id.*

17. The terms of a contract which will exempt a railroad corporation from liability for negligence must be clear and unmistakable. *Id.*

18. Defendant entered into a contract with the United States Express Company, in 1858, for the transportation of freight, by which it agreed, among other things, to transport, free of charge, the money-safes, contents and messengers of the express company, it "assuming no liability whatsoever in the matter." In 1871 another contract was made, by its terms, adopting the conditions of the former contract, save as modified. It provided that defendant should assume the usual risks taken by railroads as to freight, except that it "shall not assume any risk or loss on any money, bank-notes, bonds, gold, bullion or jewelry packages, and for which, with the express company's safes and messengers, no charge for carriage is to be made." *Id.*

19. In an action for the negligent killing of an express messenger, *held* (EARL, J., dissenting), that the clause referred to in the contract of 1858 was abrogated by that of 1871; also that reading them both together there was no exemption of defendant from liability. *Id.*

20. As to whether, when the absolute duty is imposed by law upon a city to construct and keep in repair the sidewalks therein, it is not liable for injuries resulting from the improper construction of a sidewalk, although the work was done in accordance with the directions of its common council, *quære*. *Clemence* v. *City of A.*, 334

21. In an action to recover damages for injuries sustained by plaintiff from falling upon a sidewalk on one of defendant's streets, plaintiff's evidence tended to show that a sidewalk had been laid at a grade fixed; that in consequence of the raising of an intersecting street a new grade was necessary and had been fixed by the common council. A portion of the walk was built upon the new grade, and where the old and the new walk came together there was a difference of several inches; the chairman of the street committee of the common council directed that a stone, to join the old and new walks, be laid at a slope of six inches, in about three feet and a half, an angle much greater than that on either side; upon this stone plaintiff slipped and fell. The stone had been suffered to remain several years; similar casualties had occurred, and the evidence tended to show that it was unsafe for persons passing over it, whose attention was not particularly called to the difference. The court directed a nonsuit, on the ground that the common council acted judicially in establishing the grade, and the sidewalk having been built in conformity therewith, defendant was not liable; *held*, error; that it could not be assumed that the chairman of the street committee was authorized to change the grade, or that it was changed by direction of the common council; that the injury was not in consequence of any action of the common council establishing a grade, but resulted from the manner of constructing the sidewalk in violation of the requirements of the common council, and the cause of action, if any, was for neglect to remedy the defect; that if the walk was, in fact, in an unsafe condition, defendant was liable; and that that question was, upon the evidence, one of fact for the jury. *Id.*

22. In an action to recover damages for injuries sustained by defendant's alleged negligence, plaintiff's evidence tended to show that he was a passenger on defendant's road; that the name of the station to which he was destined was called out, and the train stopped; that, as he reached the platform of the car, it started back with a sudden jerk, which threw him forward, and he fell through between the cars; that the train immediately started forward again, and while plaintiff lay on the track he was struck by a car-wheel, either as the train moved backward or forward. The court charged, in substance, that if this

was true, and the motion backward was caused by the engine, defendant was chargeable with negligence, and that it was immaterial whether the injury was caused by the motion forward or backward. *Held*, no error; that a jerking of a train backward, under such circumstances, was negligence, and that the latter part of the charge was to be interpreted as referring to the immediate, not to the proximate, cause of the injury. *Millman* v. *N. Y. C. and H. R. R. R. Co.* 642

23. The fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car, nor does it free the company from its duty to render to him, as a passenger, due care. It is the duty of a carrier of passengers to observe the same care to a drunken as to a sober passenger. *Id.*

NEW YORK (CITY OF).

1. The office of commissioner of jurors, created by the act of 1847, "in relation to jurors of the city of New York" (chap. 495, Laws of 1847), was not made thereby distinctively a county office, nor did the commissioners succeed to powers theretofore exercised by an officer of the county of New York. *People ex rel.* v. *Dunlap.* 162

2. Assuming, however, that it was a county office, it was a new office created by the act; the legislature had power subsequently to change its character from a county to a city office, and to provide for a different mode of appointment. *Id.*

3. The provision, therefore, of the act of 1873, "to reorganize the local government" (chap. 335, Laws of 1873), vesting the power of appointment of commissioner of jurors in the mayor and common council, which made the office distinctively a city one, whatever had been its previous character, is embraced in the subject expressed in the title of the act, and so not in conflict with section 16 of article 3 of the State Constitution; and an appointment to the office in accordance with the provisions of said act of 1873 is valid. *Id.*

4. Under the provisions of the act of 1873 (chap. 613, Laws of 1873), providing for the annexation of certain towns in Westchester county to the city and county of New York, which, by its terms (§ 18), was to take effect January 1, 1874, except as to parts "otherwise provided for," and which act declares (§ 5), that said towns shall constitute the tenth judicial district, a justice of which shall be elected "at the next general election," the election intended was the next after the passage of the act, *i. e.*, that of November, 1873. *People* v. *Flanagan.* 237

5. The provisions of said act (§§ 1, 2) directing such annexation are within the exception, and such annexation took place at the passage of the act. *Id.*

6. It was also the legislative intent (§ 2.) that the election of 1873 should be conducted in accordance with the election laws then operative in the county of Westchester, not in conformity to the law applicable only to the city of New York. *Id.*

7. Accordingly, *held*, that a justice elected for said district at the general election in 1873, under the laws operative in said county of Westchester, and without regard to the registry acts applicable to the city, was regularly elected and entitled to the office. *Id.*

8. Also *held*, that the act of 1874 (chap 339, Laws of 1874) re-enacting and amending said act of 1873, was intended, and operated, as a confirmation of such election, even if conducted irregularly. *Id.*

9. Summary proceedings were commenced in a District Court of the city of New York by plaintiff against the defendant and the board of police commissioners to dispossess them for non-payment of rent. The affidavit and summons alleged that defendant was

the tenant, and occupied through itself and the said board as under-tenants. Defendant did not appear, but the board appeared, and, by consent, the matter was adjourned. *Held*, that the adjournment was proper, and that the court was not thereby ousted of jurisdiction to proceed on the adjourned day against defendant. *Brown* v. *The Mayor*. 385

10. The affidavit, upon which the proceedings were based, was sworn to before a notary public. *Held*, that it was properly verified. (§ 4, chap. 741, Laws of 1870). *Id.*

11. The power of the corporation of the city of New York to assess for local improvements all property benefited thereby is limited by the provision in the act of 1840 (§ 7, chap. 326, Laws of 1840) prohibiting an assessment exceeding half the value of the property, as valued by the general tax assessing officers; and can only be exercised as to property which has been previously valued by said officers; and then only to an amount not greater than half the value named by them. (RAPALLO and ANDREWS, JJ., dissenting.) *In re Second Ave. M. E. Church*. 395

12. This proviso applies as well to property of religious corporations used for religious purposes on which, as it is exempted from taxation, the assessors of the ward are not required by law to make a valuation as to other property. (RAPALLO and ANDREWS, JJ., dissenting.) *Id.*

13. Accordingly *held* (RAPALLO and ANDREWS, JJ., dissenting), where, upon a motion to vacate an assessment upon such property, it did not appear that there was an assessment roll made by the tax commissioner and deputy upon which the property appeared, with a valuation attached, that the assessment was illegal and void. *Id.*

14. Also, *held*, that the acts of 1874 (chaps. 312 and 313, Laws of 1874), providing that no assessment for a local improvement shall be vacated for an omission in the performance of any official duty, or in carrying out the details of a law or ordinance, or for any defect in authority, or for any irregularity, did not apply, as it was not simply a defect, omission or irregularity, but a total absence of power; and that, therefore, the assessment was properly vacated. *Id.*

15. The system of audits and payments of accounts, provided by the act of 1873, reorganizing the government of the city of New York (chap. 335, Laws of 1873), applies to all payments from the city treasury, including payments from school moneys upon contracts of the board of education; the system provided for by the act of 1851, in relation to the common schools of said city (chap. 386, Laws of 1851), also remains in force. *Dannat* v. *The Mayor*. 585

16. To obtain payment upon such a contract, therefore, the board of education must give its draft on the city chamberlain, as prescribed in the act of 1851, which must be delivered by the payee to the finance department, as his voucher, and all the steps to final payment must be taken, as are required of other claims against the city treasury, by the act of 1873. An action can only be sustained against the city after these steps have been taken, and only in case of default on its part in omitting to discharge some duty imposed upon it by statute. *Id.*

17. One, who was not at the time either constable or marshal, appointed by the sheriff of the city and county of New York "a special deputy sheriff to assist in preserving the public peace, to attend the Court of Oyer and Terminer," cannot receive compensation for his attendance upon said court under such appointment. *Day* v. *The Mayor*. 592

18. The present marshals of the city of New York answer the description of officers who may be summoned by the sheriff. *Id.*

19. In pursuance of a contract made, November 5, 1870, plaintiff, deeded to defendant certain premises in the city of New York, December 5, 1870, with a covenant that they were free from all *charges*, assessments and incumbrances. An assessment againt plaintiff upon the premises for a street improvement, was confirmed by the board of revision and correction of assessments, November 7, 1870, but the title of the assessment was not entered in the title-book of assessments, in the bureau of arrears, until December twenty-fourth. In an action to recover the assessment, *held* (RAPALLO, J., dissenting), that the provisions of the acts relating to the collection of arrears of assessments, etc., in the city of New York (§ 6, chap. 379, Laws of 1853; § 1, chap. 381, Laws of 1871), declaring that no assessment shall be deemed to be confirmed so as to be a lien on property included in it, until the title shall be entered in said title-books as prescribed, did not affect plaintiff's liability under the covenant; that the assessment was fairly embraced in its terms, and that plaintiff was bound to pay the same. *De Peyster* v. *Murphy*. 622

20. The Marine Court of the city of New York has no jurisdiction of an action against the city corporation. *Callahan* v. *The Mayor*. 656

21. The provisions of the acts of 1860 (chap 379, Laws of 1860) and 1868 (chap. 853, Laws of 1868), giving to the Supreme Court of the first judicial district, the Court of Common Pleas for the city and county, and the Superior Court of the city, exclusive jurisdiction in all actions where the city corporation is a party defendant, are not repealed or affected by the provision of the act of 1872, relating to the Marine Court (sub. 15, § 2, chap. 629, Laws of 1872), which gives to said court jurisdiction of actions against corporations created under the laws of this State, and having an office or transacting business in the city of New York; that provision is only applicable to private corporations. *Id.*

22. The appearance and answer, by attorney for defendant, in an action brought in the Marine Court against the corporation of the city of New York, is not a waiver of the question of jurisdiction, and does not confer jurisdiction. *Id.*

——*Jurisdiction of Marine Court of.*

See Anderson v. *Reilly*, 189.

NON-RESIDENTS.

——*Of State attending court as witnesses cannot be served with summons in civil action.*

See Persons v. *Grier*, 124.

NOTICE.

1. Where one has been constituted and accredited as agent to carry on a business for another, his authority to bind his principal continues after actual revocation as to those who have been accustomed to deal with him as such agent, until notice of the revocation is brought home to them. *Claflin* v. *Lenheim*. 201

2. As to whether the doctrine of constructive notice is applicable to such a case, *quære*. *Id.*

3. Dubious or equivocal circumstances will not be substituted for actual notice. *Id.*

——*Of mechanics' lien in Rensselaer county, properly filed in office of town clerk.*

Vandenburgh v. *The President, etc.*, 1.

——*Of revocation of agent's authority, necessity for, to protect principal and sufficiency of.*

See McNeilly v. *Com. Life Ins. Co.*, 23.

NUISANCE.

——*When highway officers have right to abate.*

See Kellogg v. *Thompson*, 83.

OATH.

—— *Necessary to authorize justice of the peace to punish witness for contempt in refusing to answer.*
See Rutherford v. *Holmes*, 368.

OFFICE AND OFFICERS.

1. The sureties upon the bond of a public officer are liable thereon only for the defaults of their principal committed after the commencement of the term of office for which they became his sureties. Although their principal held the office during a preceding term, they are not liable for a defalcation which then occurred. *Bissell* v. *Saxton*. 55

2. In such case those who were sureties for the officer for the prior term must be looked to. *Id.*

3. Where the people, through their constitutional agents, ratify and recognize the title of a citizen to an office, it is not competent for them to question it by *quo warranto*. *People* v. *Flanagan*. 237

4. The legislature has full power thus to ratify. *Id.*

—— *Commissioner of jurors in New York, a city office.*
See People ex rel. v. *Dunlap*, 162.

ORDER.

—— *Accepted payable out of future installments on contract, when not affected by cancellation of contract.*
See Jenks v. *Brown* (Mem.), 629.

OYER AND TERMINER.

See COURTS OF OYER AND TERMINER.

PARTIES.

1. Although remaindermen and reversioners may be made parties defendant in an action for partition, they cannot institute the action, at least as against others not seized of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainderman has neither, but simply an estate to vest in possession *in futuro*. *Sullivan* v. *Sullivan*. 37

2. As to whether an action can be brought by an individual member of an incorporated religious society against its trustees to restrain the use for other religious purposes of property granted to it to be used solely for the purpose of conducting religious services in accordance with the forms and usages of a particular religious denomination, *quære*. *Watkins* v. *Wilcox*. 654

—— *Where persons who have executed undertaking indorsed on bond are not proper parties to action on bond.*
See Brown v. *Champlin*, 214.
—— *Where party to action in Justice's Court sworn as witness in his own behalf refuses to answer proper questions on cross-examination, direct-examination may be stricken out.*
See Rutherford v. *Holmes*, 368.
—— *When tax-payer cannot bring mandamus to compel assessors to perform duty.*
See People ex rel. v. *Hayt* (Mem.), 606.

PARTITION.

1. Although remaindermen and reversioners may be made parties defendant in an action for partition, they cannot institute the action, at least as against others not seized of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainderman has neither, but simply an estate to vest in possession *in futuro*. *Sullivan* v. *Sullivan*. 37

2. As to whether remaindermen having undivided interests may compel a partition as between themselves, leaving the tenants entitled

to the possession undisturbed, *quære.* *Id.*

PARTNERSHIP.

1. The business of furnishing recruits during the war of the rebellion was a lawful one, and the members of a partnership formed for that purpose had a right to agree, in their articles of copartnership, that they would not come in competition with each other, or furnish recruits for less than a price fixed. *Marsh* v. *Russell.* 288

2. Such an agreement can only be condemned on proof that it was made as part of a conspiracy to control prices or create a monopoly, and so against public policy, or that it was made for some other unlawful purpose. *Id.*

3. Plaintiffs and defendants entered into a contract that if they, or either of them, should make a contract with any town or towns of the county of W. to furnish recruits, they would share equally in the profits and losses of the business; and that, without the consent of all, they, or either of them, would make no contract for a less sum than $500 per man. In an action for an accounting, *held,* that the contract made the parties thereto copartners, and that it was not void, *per se,* as against public policy. *Id.*

4. To establish a liability against a party as a partner for the acts of others, it must be made to appear that a copartnership was formed by express agreement, or that there was an authorization in advance and a consent to be bound by such acts as a partner, or a ratification of the acts after performance with full knowledge of all the circumstances, or some act by which an equitable estoppel has been created. *C. C. S. Bk.* v. *Walker.* 424

5. After the charter of a manufacturing corporation had expired by statutory limitation, its general agent appointed during the existence of the corporation continued to carry on the business and to contract debts; and for such a debt he gave a promissory note in the name of the corporation. In an action against the stockholders seeking to charge them as makers of the note, on the ground that there was an implied contract of copartnership between them, it appeared that defendants, six months after the expiration of the charter, received dividends as from the earnings of the corporation, but without notice that it was not so paid, and without knowledge of the expiration of the charter; also, that credit was not given to them as partners or individuals, but to the supposed corporation. *Held,* that upon the expiration of the charter, the title to the corporate property vested in the trustees then in office, in trust for the creditors and stockholders (1 R. S., 600, § 1); that the defendants being merely *cestuis que trust,* could not, without other evidence than proof of their interest, be charged as copartners, and that if they had received any part of the earnings of the business carried on after the corporation ceased to exist, this did not make them liable in an action at law upon the contracts made by the agent; nor did it amount to a ratification of his acts. *Id.*

6. Also, *held,* that there was no legal distinction in respect to liability between a trustee and a simple stockholder where neither contracted the debt or authorized another to represent him in the transaction. *Id.*

7. The personal representatives of a deceased member of a firm may adjust and settle the partnership affairs with the surviving partners, and, in the absence of fraud or mistake, the settlement is conclusive upon the parties, and upon all persons claiming through them, including the creditors of the deceased partner. *Sage* v. *Woodin.* 578

8. In March, 1866, plaintiffs obtained judgment by default against C.,

and levied upon his interest in a stock of goods of a copartnership of which he was a member; by stipulation the judgment was opened, and C. allowed to come in and defend, all proceedings on the execution to be suspended "until otherwise ordered;" directions to that effect were given to the sheriff, and the firm continued its business without interference. C. died in July, 1867; his administrators had an accounting and settlement with the surviving partners, who did not know of the levy, and C.'s interest in the firm was, for a good consideration, transferred by the administrators to W., one of the survivors. The administrators were substituted as defendants in C.'s place in said action. In March, 1868, judgment was perfected therein in favor of plaintiff, whereupon the sheriff, by direction of plaintiff's attorney, sold the interest of C. in the partnership assets, and plaintiff became the purchaser. In an action brought by him against the surviving partners for an accounting, *held*, that the execution had, by the conduct of the plaintiff, and the delay of the sheriff under his directions, become dormant as against *bona fide* purchasers, in which position W. stood; and that the settlement and transfer made by C.'s administrators were conclusive upon plaintiff. *Id.*

9. It is not necessary in such case that the execution creditor should have acted in bad faith, or with intent to defraud in delaying the execution, to make it dormant as to third persons. *Id.*

—— *Sufficiency of agreement to constitute, and liability of for firm debts. See Mason* v. *Partridge* (Mem.), 633.

PATENTS (FOR INVENTIONS).

1. Plaintiff and defendants being the joint owners of certain letters patent, which they believed to be valid, entered into an agreement that the defendants should have the exclusive right to manufacture the patented article, they paying to plaintiff a specified sum as royalty on each article manufactured. In an action to recover the royalty, *held*, that the invalidity of the patent was not a defence for the time the defendants enjoyed the use of the patent unmolested under the license. *Marston* v. *Swett.* 206

2. *It seems*, that, had there been no patent, and defendants had agreed to pay the sum stipulated in consideration that plaintiff, during a given period, would not engage in the manufacture, there would have been a sufficient consideration to uphold the agreement. *Id.*

3. *Saxton* v. *Dodge* (57 Barb., 84) and the authorities holding that the invalidity of a patent is a valid defence to an action to recover the purchase-price thereof, distinguished. *Id.*

4. As to whether, when a void patent has been sold in good faith and the purchaser has enjoyed the monopoly unmolested during the whole time, and without liability to account to any one claiming a superior right, he could defend an action for the purchase-price, *quære.* *Id*

5. One owning an undivided interest in letters patent cannot maintain an action in a State court to recover compensation for its use to the extent of his interest from one using it without his permission. The cause of action does not arise upon contract, but is simply the infringement of a patent right, and so arises under the patent laws of the United States; the United States courts, therefore, have exclusive jurisdiction (ALLEN, J.; CHURCH, Ch. J., and EARL, J., concurring). *De Witt* v. *E. N. M. Co.* 459

6. *It seems*, that the license of one of two or more owners in common of letters patent confers a right as against all, and the remedy of the other tenants in common is by action for an account for whatever may have been received by the licensor. *Id.*

7. So, also, one of two or more tenants in common has the right to use the invention without the consent of the others, and is not liable to account to them for the profits made by such use. *Id.*

—— *Agreement to pay royalty for use, liability under.*
See Marsh v. *Dodge*, 533.

PAYMENTS.

1. A payment upon a bond and mortgage made by the mortgagor to the mortgagee, after an assignment thereof by the latter, when made in good faith, without notice, actual or constructive, of the assignment, is valid. *Van Keuren* v. *Corkins.* 77

2. The fact that the payment was made before due is no evidence of bad faith; nor is a want of good faith to be inferred from the facts that the bond and mortgage were not produced and payment indorsed thereon when made; or were not produced when payment in full was made, and satisfaction of the mortgage executed, or that no inquiries were made in regard to them; a failure to produce the instruments is not sufficient to put the mortgagor upon inquiry. *Id.*

3. A receipt given by the mortgagee at the time of payment is proper evidence in an action by an assignee, as part of the *res gestæ*. *Id.*

4. Where, after the maturity of a promissory note held by a bank, and due protest and notice thereof, the maker makes a general deposit in the bank of an amount sufficient to pay the note, this does not of itself, as between the bank and an indorser, operate as a payment. In the absence of any express agreement or directions, it is optional with the bank whether or not to apply the money in payment; it is under no legal obligation so to do. *Nat. Bk.* v. *Smith.* 271

LEADINGS.

1. In an action upon a contract required by the statute of frauds to be in writing it is not necessary to allege in the complaint that it is in writing. For the purposes of the complaint this will be presumed, and unless the contract is denied in the answer or alleged to be void because not in writing, the statute furnishes no defence. *Marston* v. *Swett.* 206

2. A judgment record in a former action between the parties, although not pleaded in bar, is competent to prove a material fact at issue. *Id.*

3. It is not necessary to set forth in a pleading the circumstances attending a transaction, contract, or instrument in writing, counted on; it is sufficient to charge the legal effect thereof. *Brown* v. *Champlin.* 214

4. Plaintiff's complaint contained two counts; the first alleged the making and delivery by defendants of their bond conditioned to pay B. and Y. $5,000, and an assignment for value, by the obligees to plaintiff; the second alleged that the defendants covenanted, under their hands and seals, to pay B. and Y. $4,000, who assigned the covenant, for value, to plaintiff. It appeared that defendants and B. and Y. were stockholders in a company, and agreed with plaintiff for a loan to the company of $4,000, to be secured by a mortgage of its real estate, and by the bond of defendants, under which agreement the bond described in complaint was given. *Held*, that it was not necessary to aver the facts under which the bond was given, and that the evidence established the causes of action set forth in the complaint. *Id.*

5. The complaint in this action alleged, in substance, that plaintiff, being the owner of letters patent for an improvement in harvesting machines, known as "Marsh's self-rake," entered into a written agreement with defendants by which he licensed them to make, use and vend the invention within a specified territory, they agreeing to pay a royalty of ten

dollars on each one of the patented articles made and sold by them or by their authority or procurement; that defendants sold, but failed to account and pay as agreed. The answer was a general denial. Upon the trial plaintiff proved the alleged agreement. Defendants offered in evidence another instrument executed by the parties without date, but reciting the execution of the license "this day," and defendants proved that both were executed at the same time. In the second instrument plaintiff, for a valuable consideration, agreed to give a "drawback" of three dollars on each self-rake made and sold by defendants which were attached to other machines than "Marsh's self-rake harvesters." Plaintiff's counsel objected to the instrument as inadmissable under the pleadings, and it was rejected. *Held*, error; that the instruments should be read as one; and, as the complaint only set out part of the agreement, under a denial that the agreement was as set forth, defendants were entitled to put in evidence the part omitted. *Marsh* v. *Dodge*. 533

6. To maintain an action to recover damages for deceit, in inducing plaintiff to purchase worthless property, it is not necessary to show a return or offer to return the property. The action is *ex delicto*, and not upon contract, and an averment in the complaint of an offer to return may be disregarded. *Miller* v. *Barber*. 55

7. If the action be brought on the promise implied against a fraudulent vendor, that he will restore the consideration paid by the vendee upon his electing to rescind the contract, plaintiff is bound to aver and prove a return or offer to return the property upon discovery of the fraud. *Id.*

8. Where a copy of pleadings, furnished the court upon trial, contains a reply to a counter-claim set up in the answer, it is within the discretion of the court whether to receive proof that no reply was, in fact, served or to leave defendant to his remedy by motion after trial, and its determination is not reviewable here. *Id.*

See COUNTER-CLAIM.

—— *Amendment of, on trial, when proper.*

See Parsons v. *Sutton*, 92.

—— *When complaint cannot be amended to conform to facts because of absence of proper party.*

See Easterly v. *Barber*, 433.

—— *Party who has fully performed contracts for work and labor may declare generally, without setting up contracts.*

See Higgins v. *N. and F. R. R. Co.* (Mem.), 604.

—— *When complaint sets forth two independent claims, and a receipt given for both on payment of one it shows no accord and satisfaction as to the other and is not demurrable.*

See Miller v. *Coates*. (Mem.), 609.

—— *In action to recover back moneys paid by mistake, what matters may be proved to show equities with defendant without being set up as a counter-claim.*

See K. Bk. v. *Eltinge* (Mem.), 625.

PLEDGE.

1. Plaintiffs contracted to sell to B. & Co. a quantity of cotton, in store, to be paid for on delivery. The N. Y. W. & S. Co. loaned to B. & Co. a sum of money, receiving as security an invoice and written pledge of the cotton, and an order upon the warehouseman. Upon presentation of the order, and while the cotton was being weighed and examined for delivery, the warehouseman, with the consent of plaintiffs, gave to the N. Y. W. & S. Co. the ordinary warehouse receipt for the cotton. This was on Saturday. B. & Co. did not pay for the cotton, and on the next Tuesday failed. In an action to recover possession of the cotton, *held*, that upon the occasion of the loan to B. & Co., the N. Y. W. & S. Co. acquired no title to the cotton, as against plaintiffs, as it parted with its money solely upon the engagement of that firm, and upon their order; that no title was acquired at the time of the delivery of the warehouse receipt, as no value

was parted with upon the faith of it; but that, upon receiving the receipt, said company had a right to repose upon it as a ratification of the prior pledge, and having relied upon it, and thereby having been induced to refrain from any attempt to recover the loan or secure an indemnity, plaintiffs were estopped from claiming title. *Voorhis* v. *Olmstead*. 113

2. It is not necessary in such case for the pledgee of property to show that a demand of the money loaned would necessarily have resulted in its recovery; it is enough to show that his position was altered by relying on the evidence of title, and a consequent abstaining from action. *Id.*

PRESCRIPTION.

It *seems* that a prescriptive right cannot be acquired, as against the public, by a twenty years' flow of water along a highway. *Kellogg* v. *Thompson*. 88

PRESUMPTION.

—— *Of intent, that one supporting a person for whose support provision is made by will, should have benefit of the provision.*

See Thurber v. *Chambers*, 42.

—— *As to ground upon which motion to open default was granted.*

See Dinsmore v. *Adams*, 618.

—— *In favor of correctness of verdict.*

See Card v. *Duryee* (Mem.), 651.

PRINCIPAL AND AGENT

1. One who has dealt with an agent in a matter within the agent's authority has a right to assume, if not otherwise informed, that the authority continues, and, unless notice of revocation is brought home to him, the principal is bound if the dealings continue after the authority is revoked. *McNeilly* v. *C. Ins. Co.* 23

2. G. having failed in the butchering business, his brother H. bought out the business, and authorized G. to carry it on in his name. H. told E., of whom G. had been in the habit of purchasing cattle for the business, that, as he was carrying on the business, he would be responsible for all cattle sold to G. It was necessary and had been customary to give notes for cattle purchased. G. signed the name of H to notes given to E. for cattle, which defendant K. indorsed upon the representation of E. that H. had signed them. Defendant knew the facts as to method of conducting the business, and had indorsed a large number of notes signed in the same way. In an action upon the notes, *held*, that the facts authorized an inference that G. had authority to sign notes in the name of H., and so justified a finding that the notes were made by H. *Turner* v. *Keller*. 66

3. Defendant having given evidence tending to show that E. induced G. to sign the name of H. to the note, knowing that G. had no authority, and after authority was sought to be proved by the circumstances above stated, E., as a witness for plaintiff, was allowed to testify, under objection and exception, that at the time G. signed he supposed and believed that G. had authority so to sign. *Held*, no error. *Id.*

4. Also, *held*, that it was competent to prove that E. gave credit to H. after the conversation with him above stated. *Id.*

5. Where one has been been constituted and accredited as agent to carry on a business for another, his authority to bind his principal continues after actual revocation as to those who have been accustomed to deal with him as such agent, until notice of the revocation is brought home to them. *Claflin* v. *Lenheim*. 301

6. As to whether the doctrine of constructive notice is applicable to such a case, *quære*. *Id.*

7. Dubious or equivocal circumstances will not be substituted for actual notice. *Id.*

8. In an action to recover for goods sold, it appeared, indisputably, that, prior to July, 1867, H., the brother of defendant, with authority to act for him, had carried on a store at M., in the name of defendant, and was in the habit of purchasing goods for the store from plaintiffs on defendant's credit, the bills therefor being rendered to and paid by him. In July, 1867, the store was partially destroyed by fire, and the agency of H. was terminated. Defendant carried on a store himself at G. B., purchasing goods therefor of plaintiffs, but, having some difficulty in settling with them the accounts of the store at M., after the fire, he suspended all dealings until October, 1869, when he again purchased goods for his store at G. B. In November and December, 1869, H., without authority, purchased goods in defendant's name, to go to M. in the same manner as before. Plaintiffs had notice of the fire, but the evidence was conflicting as to whether they had notice of the termination of the agency. The court submitted to the jury, among other things, the question whether, independent of notice, in fact, the circumstances were such as to put the plaintiffs upon inquiry; and charged, in substance, that if they were, although there was no actual notice of the revocation of the agency, plaintiffs were chargeable with constructive notice thereof, and could not recover. *Held*, error; that the facts bearing upon the question of constructive notice being undisputed, that question was one of law for the court, and, as matters of law, they were insufficient to put plaintiffs upon inquiry, or charge them with constructive notice. *Id.*

9. Where one transferring property in fraud of his creditors has in his hands, at the time of such a transfer, as agent for another, securities belonging to his principal, for which he is liable to account, although no demand has been made upon him to transfer and surrender the securities, yet there is a fiduciary and pecuniary obligation, and a contingent liability which makes the principal a creditor, within the meaning of the statute, against fraudulent conveyances. (2 R. S., 135, § 1; 137, § 1.) *Young* v. *Heermans*. 314

10. It is not necessary for the principal, in order to impeach the transfer for fraud, to show that his agent actually intended at the time a misappropriation or conversion of the securities. *Id.*

11. After the commencement of an action by a principal to set aside such a conveyance made by his agent, the latter died; his personal representatives were substituted as defendants, but his heirs at law were not brought in. *Held*, that while, so far as the real estate was concerned, the proper parties were not before the court to authorize a determination of the question as to whether a legal estate vested in the grantee upon valid trusts, as against the heirs, yet that plaintiff was entitled to judgment, declaring the conveyance void and his judgment a lien upon the real property as against the grantee, as if no conveyance had been made, with leave to proceed by execution against the lands according to the course and practice of the court. *Id.*

12. Where a lender has received a security providing for the payment of the precise amount loaned by him with lawful interest, the fact that his agent, without his authority, knowledge or participation, has extorted from the borrower a sum of money upon the false pretence that a portion thereof was a bonus for his principal does not taint the security with usury. *Estevez* v. *Purdy*. 446

13. The employment of an agent to effect a loan does not impliedly or apparently authorize him to violate law or do an illegal act. *Id.*

14. The fact that an action upon the security is commenced by the principal after knowledge upon his part of the exaction of the agent is not a ratification thereof; the security coming to him unaffected

by usury, he has the right to enforce it. *Id.*

15. After payment of a portion of the amount due upon a bond secured by mortgage, the obligors applied to the agent of the obligees for a reloan of the sum paid upon the same securities. This the obligees agreed to. The agent exacted of the obligors $225 professedly for the obligees, who did not receive any portion of it and knew nothing of the representation. One of the obligees was informed by the obligors before the loan of the terms their agent exacted, to which he replied that it was too much for the agent's services. The obligees loaned the full amount, and it did not appear that they knew how much was finally paid or agreed to be paid to the agent. *Held*, that the evidence rebutted any inference that the obligees connived at, consented to, or authorized the charge, and that, therefore, there was no usury. *Id.*

—— *Authority of agent and what constitutes general agent of life insurance company.*

See Mersereau v. *P. M. L. Ins. Co.*, 274.

—— *Maker of note transferred as payment upon or security for a debt is not agent of debtor to renew promise by payment so as to take debt out of statute of limitations.*

See Smith v. *Ryan*, 352.

PRINCIPAL AND SURETY.

1. The sureties upon the bond of a public officer are liable thereon only for the defaults of their principal committed after the commencement of the term of office for which they became his sureties. Although their principal held the office during a preceding term, they are not liable for a defalcation which then occurred. *Bissell* v. *Saxton.* 55

2. In such case those who were sureties for the officer for the prior term must be looked to. *Id.*

3. In an action upon a bond of an officer, his official reports are not conclusive as against his sureties, but mere admissions of the principal, subject to explanation. *Id.*

4. Accordingly, *held*, that the official reports of railroad commissioners charging themselves with a certain fund were not conclusive against their sureties, in an action upon their bond, that the commissioners then had the fund on hand; and, it appearing that the fund had in fact been received and converted by one of their number during a prior term, that the sureties were not liable. *Id.*

5. So, also, *held*, that statements made by the principals upon applying for a reappointment were not conclusive against the sureties. *Id.*

6. The said commissioners were appointed under the act of 1856 (chap. 64, Laws of 1856) authorizing subscriptions by towns to the stock of the A. & S. R. R. Co. By the act of 1867 (chap. 747, Laws of 1867), amendatory of said act, each town commissioner is required to account annually for moneys coming into his hands, "with the interest thereon, provided such moneys have been used or loaned by him." *Held*, that this provision did not authorize a commissioner to use the funds in his hands in his individual business, and that, in case he did so and failed to restore them, it was a conversion of the funds and a defalcation. *Id.*

7. The right to contribution between co-sureties depends upon principles of equity rather than upon contract. The equity does not arise from the fact simply that both parties are sureties. They must stand in the same relation to the principal and without equities between themselves, giving one an advantage over the other. *Wells* v. *Miller.* 255

8. It is competent to prove by parol the relation of the parties, and any extrinsic facts affecting the equities. *Id.*

9. In an action against sureties upon

a bond given by an agent for the faithful performance of his duties, the surrounding circumstances and the situation of the parties, at the time of its execution, may be considered in construing its terms, in case of ambiguity therein. *W. N. Y. L. Ins. Co.* v. *Clinton.* 326

10. It is no defence to an action upon such bond that the sureties were ignorant as to the extent of the obligation assumed, or were misled by the principal in reference thereto, in the absence of proof that the obligee was a party to the fraud; it is not the duty of the obligee to seek out the sureties and explain to them the nature and extent of their obligation, but it is for the sureties to ascertain for themselves. *Id.*

PUBLIC POLICY.

1. The business of furnishing recruits during the war of the rebellion was a lawful one, and the members of a partnership formed for that purpose had a right to agree, in their articles of copartnership, that they would not come into competition with each other, or furnish recruits for less than a price fixed. *Marsh* v. *Russell.* 288

2 Such an agreement can only be condemned on proof that it was made as part of a conspiracy to control prices or create a monopoly, and so against public policy, or that it was made for some other unlawful purpose. *Id.*

8. Plaintiffs and defendants entered into a contract that if they, or either of them, should make a contract with any town or towns of the county of W. to furnish recruits, they would share equally in the profits and losses of the business; and that, without the consent of all, they, or either of them, would make no contract for a less sum than $500 per man. In an action for an accounting, *held*, that the contract made the parties thereto copartners, and that it was not void, *per se*, as against public policy. *Id.*

PUNISHMENT.

1. In legal view, punishment for a crime does not begin until after the criminal has been convicted and sentenced; any imprisonment prior to sentence will not inure to his benefit as part of the punishment. *People ex rel* v. *The Warden, etc.* 342

2. As to whether it is within the province of the courts to award to a prisoner in a State prison the time to which he is entitled for good conduct, *quære.* *Id.*

QUESTIONS OF LAW AND FACT.

—— *When question of revocation of agent's authority one of fact.*
See McNeilly v *C. L Ins. Co.*, 23.
—— *When question as to materiality of circumstances affecting risk, in action on policy of marine insurance one of law.*
See Leitch v. *A. M. Ins. Co.*, 100.
—— *When question of waiver of condition, in policy of fire insurance policy, one of fact.*
See Church v. *G. F. F. Ins. Co.*, 222.
—— *Duty of appellate court, when facts are before it for review.*
See Godfrey v. *Moser*, 250.
—— *When question of notice of revocation of agent's authority, one of law.*
See Claflin v. *Lenheim*, 301.
—— *When question of sale one of fact.*
See Richard v. *Wellington*, 308.
—— *When question of negligence on part of municipal corporation, one of fact.*
See Clemence v. *City of A.*, 334.
—— *When question of conversion one of fact.*
See A. M. Co. v. *Kessler* (Mem.), 637.

QUO WARRANTO.

1. Where the people, through their constitutional agents, ratify and recognize the title of a citizen to an office, it is not competent for them to question it by *quo warranto.* *People* v. *Flanagan.* 237

2. The legislature has full power thus to ratify. *Id.*

RAILROAD CORPORATIONS.

1. A female who has accepted an invitation to take a ride with a person in every way competent and fit to manage a horse, is not chargeable with his negligence, and contributory negligence upon his part is no defence to an action against a railroad corporation for injuries resulting from a collision. *Robinson* v. *N. Y. C. and H. R R. R Co.* 11

2. Accordingly, *held*, that a charge in such an action that if defendant was negligent and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence, which contributed to the injury, was proper. *Id.*

3. Interest coupons to railroad bonds, payable to bearer at a specified time and place, are negotiable promises for the payment of money, and are subject to the same rules as other negotiable instruments. They are transferable by delivery, although detached from the bonds, and a purchaser, in good faith before maturity, from one who has stolen them acquires a valid title. *Everteon* v. *Nat. Bk.* 14

4. The fact that by their terms they are declared to be for interest upon bonds specified by their numbers does not destroy their negotiability when separated from the bonds, or impair the title of one purchasing from another without production of the bonds. *Id.*

5. Such instruments are entitled to days of grace; and one purchasing after the expiration of the time of payment specified, but before the expiration of the days of grace, is a purchaser before maturity. *Id.*

6. Where, however, interest coupons or warrants to such bonds are not made payable to bearer or order, they are not negotiable when separated from the bonds, although the latter are themselves negotiable, and a purchaser of these detached instruments takes them subject to all defects in the title of his transferrer, and therefore subject to the claims of the true owner in case they have been stolen. *Id.*

7. The sudden jerking of a railroad train backward while passengers are rightfully passing out of the cars is liable to produce accidents, and is negligence. *Sauter* v. *N. Y. C. and H. R. R. R. Co.* 50

8. In an action upon a bond of an officer, his official reports are not conclusive as against his sureties, but mere admissions of the principal, subject to explanation. *Bissell* v. *Saxton.* 55

9. Accordingly, *held*, that the official reports of railroad commissioners charging themselves with a certain fund were not conclusive against their sureties, in an action upon their bond, that the commissioners then had the fund on hand; and, it appearing that the fund had in fact been received and converted by one of their number during a prior term, that the sureties were not liable. *Id.*

10. So, also, *held*, that statements made by the principals upon applying for a reappointment were not conclusive against the sureties. *Id.*

11. The said commissioners were appointed under the act of 1856 (chap. 64, Laws of 1856) authorizing subscriptions by towns to the stock of the A. and S. R. R. Co. By the act of 1867 (chap 747, Laws of 1867), amendatory of said act, each town commissioner is required to account annually for moneys coming into his hands, "with the interest thereon, provided such moneys have been used or loaned by him." *Held*, that this provision did not authorize a commissioner to use the funds in his hands in his individual business; and that, in case he did so and failed to restore them, it was a conversion of the funds and a defalcation. *Id.*

12. Although a railroad company has, by permitting people repeatedly to cross its track at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track, nor will a departure in some degree or particular by its employes from the ordinary course of proceedure make it liable for an injury resulting therefrom unless it involves the doing of an act which might reasonably be anticipated would result in injury to a person lawfully on the track under the license. The licensees acting under it take the risks incident to the business. *Sutton* v. *N. Y. C. and H. R. R. Co.* 243

13. S, plaintiff's intestate, was employed in a foundry, the workmen in which had been accustomed to cross defendant's track at a certain point. It was defendant's daily custom to disconnect cars from trains backing down on the track nearest the foundry, which by their momentum would pass by the foundry, when a brakeman would apply the brakes. S. came out of the foundry as cars so disconnected were passing. They stopped just as the rear one passed the door. He stepped across the track, when his progress was arrested by a train approaching on the second track, and he stepped backward upon the track he had crossed, where he was struck and killed by the disconnected cars, which in consequence of a slight down grade, the brakeman having failed to apply the brakes, had started of themselves slowly backward. No instance of a car thus running backward had ever been known before. In an action to recover damages, *held*, that a refusal of the court to charge that the defendant owed no duty to the deceased to set the brakes, or otherwise fasten the cars, was error; and that the evidence did not make out a cause of action. *Id.*

14. Where there is no express exemption provided by contract, a railroad company is liable for the consequences of its own or its servants' negligence to persons traveling upon its trains, as messengers or agents of an express company, to the same extent as to other passengers, although no charge is made for their fare. *Blair* v. *E. R. Co.* 313

15. One temporarily supplying the place of an express messenger stands in the same position with him, and is entitled to the same protection. *Id.*

16. The terms of a contract which will exempt a railroad corporation from liability for negligence must be clear and unmistakable. *Id.*

17. Defendant entered into a contract with the United States Express Company, in 1858, for the transportation of freight, by which it agreed, among other things, to transport, free of charge, the money-safes, contents and messengers of the express company, it "assuming no liability whatsoever in the matter." In 1871 another contract was made, by its terms, adopting the conditions of the former contract, save as modified. It provided that defendant should assume the usual risks taken by railroads as to freight, except that it "shall not assume any risk or loss on any money, bank-notes, gold, bullion or jewelry packages, and for which, with the express company's safes and messengers, no charge for carriage is to be made. In an action for the alleged negligent killing of an express messenger, *held* (EARL, J., dissenting), that the clause referred to in the contract of 1858 was abrogated by that of 1871; also that reading them both together there was no exemption of defendant from liability. *Id.*

18. Under the general railroad act the question as to the necessity of the appropriation of lands for the use of a railroad corporation is a judicial one for the court to determine; and when controverted the facts must, in some form, be presented to the court to enable it

to decide. *In re N. Y. C. R. R. Co.* 407

19. Where a railroad corporation makes application to acquire land in addition to that which it is entitled to take for its roadway, and objections are made by the owner, coupled with a denial of the special allegations of the petition respecting the purposes for which the land is required, the burden is upon the petitioner of adducing proof of the special circumstances alleged in support of the averment that it requires the land. *Id.*

20. The provision of the general railroad act (§ 15, chap. 140, Laws of 1850, as amended by § 2, chap. 282, Laws of 1854), authorizing the land owner to disprove the allegations of the petition was intended to enable him to introduce proof upon his part to meet that offered by the petitioner, and to disprove allegations of the petition capable of being disproved; as to the special circumstances lying within the knowledge of the petitioner it is put to its proofs, if the owner show sufficient cause against the petition. *Id.*

21. A passenger who is lawfully upon a railroad train and has paid his fare has the right to offer such resistance to any attempt on the part of the conductor to remove him therefrom as may be necessary to prevent his being ejected; and if, in consequence of his resistance, extraordinary force becomes necessary and is used to remove him, and he is injured thereby, he can recover of the corporation for such injury. (MILLER, J., CHURCH, Ch. J., and RAPALLO, J., concurring.) *English* v. *D. and H. C. Co.* 454

22. A passenger has the right to resist an attempt to eject him from a train for non-payment of fare made when the train is in motion, so that his being put off would subject him to great peril. (MILLER, J., CHURCH, Ch. J., and RAPALLO, J., concurring.) *Id.*

23. In an action to recover damages for injuries sustained by defendant's alleged negligence, plaintiff's evidence tended to show that he was a passenger on defendant's road; that the name of the station to which he was destined was called out, and the train stopped; that, as he reached the platform of the car, it started back with a sudden jerk, which threw him forward, and he fell through between the cars; that the train immediately started forward again, and while plaintiff lay on the track he was struck by a car-wheel, either as the train moved backward or forward. The court charged, in substance, that if this was true, and the motion backward was caused by the engine, defendant was chargeable with negligence, and that it was immaterial whether the injury was caused by the motion forward or backward. *Held*, no error; that a jerking of a train backward, under such circumstances, was negligence; and that the latter part of the charge was to be interpreted as referring to the immediate, not to the proximate, cause of the injury. *Milliman* v. *N. Y. C. and H. R. R. R. Co.* 642

24. The fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car; nor does it free the company from its duty to render him, as a passenger, due care. It is the duty of a carrier of passengers to observe the same care to a drunken as to a sober passenger. *Id.*

—— *Power of municipal corporation to subscribe for stock of, and to issue bonds in payment therefor, and the validity of such bonds.*

See Williams v. *Town of D.*, 129.

RATIFICATION.

—— *Of unauthorized acts of agent, what will not amount to.*

See C. C. S. Bank v. *Walker*, 424.
Estevez v. *Purdy*, 446.

REAL PROPERTY.

See FIXTURES.

——*When clause in will authorizing sale, will not operate as equitable conversion of realty into personalty.*
See Gourley v. *Campbell*, 169.
——*When it will so operate.*
See Fisher v. *Banta*, 468.

REARGUMENT.

——*Renewal of motion for, without leave, proper ground of denial, also that remittitur has gone down and has been filed.*
See Cochran's Exr. v. *Ingersoll* (Mem.), 652.

RECEIPT.

——*Of payment to mortgagee, when evidence against assignee of mortgage.*
See Van Keuren v. *Corkins*, 77.

RECEIVER.

1. Where, in an action to set aside conveyances of real estate as obtained by fraud, an interlocutory judgment has been rendered determining the title to be in plaintiff, subject to certain liens of defendant, and directing an accounting, and where, by consent, a receiver has been appointed to receive the rents during the accounting, it is within the discretion of the court to order the receiver to pay over the rents collected to the plaintiff upon such terms as it may deem proper. *Platt* v. *Platt.* 360

2. The exercise of this discretion may be reviewed by the General Term, but not by this court, and the order of the General Term thereon is not appealable. *Id.*

3. The firm of V. & B. consigned their goods to the firm of H. S. & Co., commission merchants, for sale. V. agreed with H., S. & Co. to secure advances made to his firm by keeping on deposit with them funds sufficient for that purpose. He had then standing to his individual credit $50,000. He thereafter drew drafts and made deposits, and statements of the account were made to him from time to time, in which he was allowed interest on the credits and charged interest on the debits. V. & B. received advances at times larger than the balance due V. H., S. & Co. suspended, owing V. $18,545.26. V. & B.'s account was closed and any balance paid. A receiver was appointed of the property of H., S. & Co. V. moved that the receiver be required to pay him the balance so due, on the ground that it was a special deposit in the hands of the receiver. *Held*, that the motion was properly denied; that the receiver had no property which belonged to V., or upon which he had a legal or equitable lien; and that he was simply a creditor of the insolvent firm with no more right to the specific amount of his claim than any other creditor. *Butler* v. *Sprague.* 392

4. Also *held*, that even if V. had shown that he made a special deposit, he could only recover it in case he found the same money in the hands of the receiver, or property in which it had been wrongfully invested or which had been wrongfully substituted for it; that if wrongfully converted by H., S. & Co. the only claim of V. against the insolvent estate was that of a creditor. *Id.*

RECORDING ACT.

1. Where a mortgage which has been assigned, but the assignment not recorded, is satisfied of record by the mortgagee, a subsequent mortgagee is a "subsequent purchaser," within the recording act (1 R. S., 762, §§ 37, 38); and as to him the assignment is void. *Van Keuren* v. *Corkins.* 77

2. One who either with or without notice of a prior unrecorded mortgage, takes a mortgage or conveyance of land as security for an existing debt, without giving up any security or divesting himself of any right, or doing any act to his own prejudice, on the faith of the title, is not a *bona fide* purchaser

for value within the meaning of the recording act (1 R. S., 756, § 1), and as against him the prior mortgage is valid. *De Lancey* v. *Stearns.* 157

3. An assignee for value, of the subsequent mortgage, or grantee for value, claiming under the subsequent deed, stands in no better position than the mortgagee or original grantee. *Id.*

REDEMPTION.

1. A purchaser, at a legal tax sale, of land upon which there is at the time a mortgage duly recorded, upon receipt of the comptroller's deed, acquires a valid title, subject to the right of the mortgagee to redeem under the statute. (Chap. 427, Laws of 1855, § 76, *et seq.*) *Becker* v. *Howard.* 5

2. The mortgagee may, at any time within six months after receiving notice of sale, redeem; but he is not compelled to await the reception of such notice before redeeming. *Id.*

3. The purchaser at the tax sale is not compelled to give any notice to the mortgagee in order to perfect his title. He can, however, only limit the time for redemption by giving notice. *Id.*

REFERENCE.

1. A party to an action which is not referable without consent of the parties, by consenting to refer to a particular referee, does not waive his right to a trial by the court or a jury if for any reason the reference agreed upon falls through. *Preston* v. *Morrow.* 452

2. Upon the death, removal or refusal to act of the referee, the action is again in court for trial as if no reference had been consented to; and the court has not the right to order a new reference without consent of the parties. *Id.*

RELIGIOUS CORPORATIONS.

1. The power of the corporation of the city of New York to assess for local improvements all property benefited thereby is limited by the provisions in the act of 1840 (§ 7, chap. 326, Laws of 1840) prohibiting an assessment exceeding half the value of the property, as valued by the general tax assessing officers, and can only be exercised as to property which has been previously valued by said officers, and then only to an amount not greater than half the value named by them. (RAPALLO and ANDREWS, JJ., dissenting.) *In re Second Ave. M. E. Ch.* 395

2. This proviso applies as well to property of religious corporations used for religious purposes on which as it is exempted from taxation, the assessors of the ward are not required by law to make a valuation as to other property. (RAPALLO and ANDREWS, JJ., dissenting.) *Id.*

3. Accordingly, *held* (RAPALLO and ANDREWS, JJ., dissenting), where, upon a motion to vacate an assessment upon such property, it did not appear that there was an assessment roll made by the tax commissioner and deputy upon which the property appeared, with a valuation attached, that the assessment was illegal and void. *Id.*

4. If property be given or granted to a society incorporated under either of the first three sections of the act of 1813 (chap. 60, Laws of 1813), providing for the incorporation of religious societies, by words vesting the title and not plainly uniting the right to hold with the faith or doctrine of any particular denomination or body, a change in the religious tenets or church discipline held by it at the time of the acquisition will not deprive the corporation of the property. The majority of the corporators control and may use the property for any purpose which is religious. *Watkins* v. *Wilcox.* 654

5. As to whether an action can be

brought by an individual member of an incorporated religious society against its trustees to restrain the use for other religious purposes of property granted to it to be used solely for the purpose of conducting religious services in accordance with the forms and usages of a particular religious denomination, *quære*. *Id.*

REMAINDERMEN.

1. Although remaindermen and reversioners may be made parties defendant in an action for partition, they cannot institute the action, at least as against others not seized of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainderman has neither, but simply an estate to vest in possession *in futuro*. *Sullivan* v. *Sullivan*. 37

2. As to whether remaindermen having undivided interests may compel a partition as between themselves, leaving the tenants entitled to the possession undisturbed, *quære*. *Id.*

REMEDY.

——*When party to action in Justice's Court refuses to answer proper questions on cross-examination cannot be punished for contempt, but it seems direct-examination may be stricken out.*
See Rutherford v. *Holmes*, 368.

RENSSELAER (COUNTY OF).

1. The special lien law of 1865 for the county of Rensselaer (chap. 778, Laws of 1865) was not repealed by the act of 1869 (chap. 558, Laws of 1869) amending the general lien law of 1854 (chap. 402, Laws of 1854). Assuming that said act of 1865 was by implication repealed by the act of 1869, it was restored by the act of 1870 (chap. 194, Laws of 1870) exempting the county of Rensselaer from the operation of said act of 1869. *Van Denburgh* v. *Presdt., etc.* 1

2. Accordingly, *held*, that a notice of lien in said county was properly filed in the office of the town clerk, not of the county clerk. *Id.*

REVERSION.

——*A reversioner cannot bring action for partition.*
See Sullivan v. *Sullivan*, 37.

ROCHESTER (CITY OF).

1. The R. W. Co. was incorporated for the purpose of supplying the city of R. with water. It owned lands on the margin of H. lake, and claimed to own, as riparian proprietor, the waters of said lake. The water commissioners of the city of R., under statutes authorizing the city to acquire by proceedings, *in invitum*, easements in lands for the purpose of procuring a water supply for the city, instituted such proceedings to acquire a right to dig a trench across certain specified lands of the R. W. Co. to the lake, and to lay a pipe therein for the purpose of carrying the water of the lake to the city. *Held*, that the rights of the respective parties to the water of the lake were not involved in the proceedings, nor did the petition or orders granted in pursuance thereof seek to confer upon the city any right to take or use the water, or to do any act to the detriment of a riparian proprietor; that all that could be, or was sought to be, acquired thereunder was an easement of laying pipes and conveying through them any water to which the city had a right; that, therefore, the granting of the petition was not an interference with the corporate rights and franchises of the R. W Co, or with the use of the lands for the purposes of its organization. *In re R. W. Comrs.* 413

2. The proceedings were instituted under section 23, chapter 771, Laws of 1872, authorizing proceedings by the water commissioners in the manner prescribed by the general railroad act. It

was claimed that this section was repealed by chapter 33, Laws of 1875 (§ 1), entitled "An act supplementary" to the act of 1872, which declares that said section "is hereby amended so as to read as follows:" Following which is new matter entirely omitting all the original section. *Held*, that while ordinarily, and in the absence of any legislative intent to the contrary, an amendment in this form would work a repeal of the original section, yet, as so to hold in this case, would render the whole provision meaningless and ineffectual for any purpose; and as it appeared from the language of the statute and the amendment, from the title of the act and from chapter 39, Laws of 1875, re-enacting the original section 23, with the amendment added, that it was the legislative intention not to repeal but to add a new clause to said section, effect would be given to the intent rather than to the literal terms of the act. *Id.*

3. Also *held*, that the proceedings were properly instituted by the board of water commissioners, and without using the name of the municipal corporation or stating in terms that they acted for the city; that as the commissioners' acted in the execution of a statutory trust, the law made it a proceeding in behalf of the city, and gave to the city all property, rights and privileges acquired. *Id.*

SALES.

—— *Of lands for taxes, effect of as to prior mortgages.*
See Becker v. *Howard*, 5.
JUDICIAL SALES.

SENTENCE.

1. A court, in imposing sentence, may take into consideration the time the convict has been in custody awaiting trial, but it is matter of discretion only. *People ex rel.* v. *The Warden, etc.* 342

2. On the 6th of January, 1873, the relator was convicted of murder and sentenced to be hanged. On writ of error, proceedings were stayed, the judgment was reversed, and a *venire de novo* ordered. He was again tried October 29, 1873, having meanwhile been confined in jail; he was convicted on the second trial of manslaughter in the third degree, and sentenced to imprisonment in State prison at hard labor for four years, the maximum punishment for that crime; he was put into a State prison November 1, 1873. On February 5, 1875, he was brought out on writ of *habeas corpus*, and claimed that the time of imprisonment between the first and the second trials should be taken as part of his sentence; that this, with the time served in State prison, and the abatement earned by good conduct, in accordance with statutes (chap. 417, Laws of 1863; chap. 415, Laws of 1868; chap. 321, Laws of 1864; chap. 451, Laws of 1874), made up the full term of imprisonment. *Held*, that the claim was untenable; and that the relator was properly remanded. *Id.*

SERVICE.

1. A resident of a foreign State, while attending a court of this State as a witness, cannot be served with a process for the commencement of a civil action against him. *Person* v. *Grier*. 124

2. As to whether a distinction in respect to their immunity exists as to suitors and witnesses from a foreign State, and those residing in this State *quære*. *Id.*

SHERIFF.

1. The power of a sheriff in the selection of attendants upon courts of Oyer and Terminer is limited by the statute (2 R. S., 289, § 88) to a selection from two classes of existing officers, viz., constables and marshals. He is not authorized to select persons who are

neither for that service ; and compensation is only provided for those who, being constables or marshals, attend the courts on the summons of the sheriff. *Day* v. *The Mayor*. 592

2. Accordingly, *held*, that one who was not at the time either constable or marshal, appointed by the sheriff of the city and county of New York "a special deputy sheriff to assist in preserving the public peace, to attend the Court of Oyer and Terminer," could not receive compensation for his attendance upon said court under such appointment. *Id.*

3. The present marshals in the city of New York answer the description of officers who may be summoned by the sheriff. *Id.*

4. In an action against a sheriff for falsely returning an execution *nulla bona*, the burden is upon plaintiff to show that there was property upon which defendant, by the exercise of proper diligence, could have levied, not upon defendant to show that he could find none. *Watson* v. *Brennan*. 621.

SHIPPING.

Plaintiffs chartered defendant's brig "for a voyage from New York to Nassau, thence to Great Isaacs and back to Hampton Roads for orders to discharge at either Baltimore, Philadelphia or New York." Plaintiffs to furnish a full cargo, "or sufficient to ballast, or ballast during the voyage." Plaintiffs made a subcharter to S. for a voyage from Great Isacs to Hampton Roads for orders, etc., as in the original charter, S. to furnish a full cargo of guano at Great Isaacs. Plaintiffs furnished outward freight, and gave the captain instructions, as soon as discharged, to report to the agent of S., at Nassau, for instructions. The captain so reported, but there not being a full cargo for the brig at Great Isaacs, said agent offered to furnish a cargo at Nassau direct for New York. The captain refused, unless paid $400 in gold, stating, if this was not paid, he would go to Great Isaacs, and thence home in ballast. The agent thereupon entered into an agreement with the captain agreeing to the $400, in addition to the original charter, for non-fulfillment of the charter-party, the brig to load with a full cargo for New York. It was so loaded and returned; the $400 was paid, and was paid over by the captain to defendant. Plaintiffs paid to defendant the whole charter-money stipulated, and received from S. the charter-money stipulated to be paid by the subcharter. In an action to recover the $400, *held*, that as it was not received as damages to plaintiffs for breach of subcharter, or for a waiver of any of their rights, but, in consideration of a deviation in the voyage stipulated by the original charter, the sum was received by the master, not as agent for plaintiffs, but for the owner, and so it belonged to defendant; that the master was bound to represent the interests of plaintiffs only in respect to the receipt of cargo, etc., within the terms of their charter, and, simply, so to act as to enable him to earn the subcharter-money, which he did; he was not bound to perform a different voyage for plaintiff's benefit. *Moss* v. *Husted*. 589

SPECIFIC PERFORMANCE.

1. In an action for specific performance of an alleged parol agreement, plaintiff's evidence tended to show that he being the owner of premises upon which was a mortgage owned by defendant, and being insolvent, agreed by parol with defendant that the latter should foreclose his mortgage, bid in the premises and then sell or hold until such time as they could sell them for their value, and, when sold, defendant to deduct the amount of his mortgage, with costs and expenses, and pay plaintiff the balance. It was not agreed that plaintiff should not attend the sale, or that he should prevent others from bidding. Defendant foreclosed and bid in the property; nothing was said at the

sale about the agreement, and nothing said or done by defendant to prevent competition. Plaintiff did not attend the sale, but there was no proof that he omitted to attend or to procure others to attend in reliance upon the agreement, and that, but for the agreement, he or some other person procured by him could or would have bid it off. Defendant's claim, with costs and expenses, was about what the land was worth. There was no allegation or proof of fraud in the agreement of sale. Defendant took possession of the premises, paid taxes, etc., for nine years when this action was commenced, the land then having greatly increased in value. *Held*, that the alleged agreement could not be enforced either on the ground of part peformance or as a parol trust. *Wheeler* v. *Reynolds*. 227

2. In an action to enforce specific performance of an agreement to convey lands, the court found, in substance, that one, S., intending to give to plaintiff certain lands, executed a contract for the sale and conveyance thereof to her on payment of $1,100 which she agreed to pay. It was never intended that she should pay any thing, and S. subsequently indorsed upon the contract a receipt in full of the purchase-price; no money was in fact paid. *Held*, that whatever may have been the intent, the agreement to convey was not voluntary, as it was for a valuable consideration; that the contract did not operate as a gift of the land, and conclusively rebutted an intent to make a present gift; that the findings were in effect that the vendor, to accomplish his purpose of giving the lands, gave the debt which represented his interest therein; that the receipt operated as a valid and complete gift of the debt, leaving the right of the plaintiff to a conveyance in force, as if the debt had been paid. *Ferry* v. *Stephens*. 321

STATUTES.

1. Where a repealing statute is itself repealed, the first statute is revived, and it matters not whether the repeal in either case be by express language or by implication. *Van Denburgh* v *President, etc.* 1

2. Where a power is granted by legislative enactment, with a proviso annexed, the enactment is to be read as if no more power was ever given than is contained within the terms or bounds of the proviso. *In re Second Avenue M. E. Ch.* 395

See LIMITATION OF ACTIONS.
RECORDING ACT.
STATUTE OF FRAUDS.
—— *Chap.* 778, *Laws of* 1865.
—— *Chap.* 558, *Laws of* 1869.
—— *Chap.* 402, *Laws of* 1854.
See Vandenburgh v. *Prest., etc.*, 1.
—— *Chap.* 427, *Laws of* 1855.
See Becker v. *Howard*, 5.
—— 2 *R. S.*, 534.
See People ex rel. v. *Jacobs*, 8.
—— *Chap.* 65, *Laws of* 1856.
—— *Chap.* 747, *Laws of* 1867.
See Bissell v. *Saxton*, 55.
—— 1 *R. S.*, 762, §§ 87, 88.
See Van Keuren v. *Corkins*, 77.
—— *Chap.* 64, *Laws of* 1856.
—— *Chap.* 402, *Laws of* 1864.
See Williams v. *Town of D.*, 129.
—— 1 *R. S.*, 736, § 1.
See De Lancey v. *Stearns*, 157.
—— *Chap.* 495, *Laws of* 1847.
—— *Chap.* 335, *Laws of* 1873.
See People ex rel. v. *Dunlap*, 162.
—— *Chap.* 629, *Laws of* 1872.
See Anderson v. *Reilly*, 189.
—— *Chap.* 613, *Laws of* 1873.
—— *Chap.* 329, *Laws of* 1874.
See People v. *Flanagan*, 287.
—— *Chap.* 417, *Laws of* 1866.
—— *Chap.* 321, *Laws of* 1864.
—— *Chap.* 451, *Laws of* 1874.
See People ex rel. v. *Stokes*, 342.
—— 2 *R. S.*, 274, § 279.
See Rutherford v. *Holmes*, 368.
—— 2 *R. S.*, 135, § 1.
—— 2 *R. S.*, 137, § 1.
See Young v. *Heermans*, 375.
—— 2 *R. S.*, 512, § 28.
—— *Chap.* 828, *Laws of* 1866.
—— *Chap.* 741, *Laws of* 1870.
See Brown v. *The Mayor*, 385.
—— *Chap.* 326, *Laws of* 1840.
—— *Chap.* 312, *Laws of* 1874.
—— *Chap.* 313, *Laws of* 1874.
See In re Second Ave. M. E. Ch., 395.
—— *Chap.* 140, *Laws of* 1850.
—— *Chap.* 282, *Laws of* 1854.

See In re N. Y. C. R. R. Co., 407.
—— *Chap.* 771, *Laws of* 1872.
—— *Chap.* 83, *Laws of* 1875.
—— *Chap.* 39, *Laws of* 1875.
See In re R. W. Comrs., 413.
—— 1 R. S., 600, § 1.
See C. C. S. Rk. v. Walker, 424.
—— 2 R. S.,
See McRea v.
—— *Chap.* 1
—— *Chap.* 2
—— *Chap.* 3
—— *Chap.* 4
See In re D.
—— *Chap.* 2
—— *Chap.* 3
See Dannat v
—— 2 R. S.,
See Day v. T
—— *Chap.* 4
See People ex
—— *Chap.* 5
—— *Chap.* 381, *Laws of* 1871.
See De Peyster v. Murphy (Mem.), 622.
—— *Chap.* 628, *Laws of* 1857.
See Milliman v. N. Y. C. and H. R. R. R. Co (Mem.), 649.
—— *Chap.* 68, *Laws of* 1860.
See Dodge v. Village of C. (Mem.), 648.
—— 2 R. S., 134, § 6.
See Hall v. Erwin (Mem.), 649.
—— *Chap.* 60, *Laws of* 1818.
See Watkins v. Wilcox (Mem.), 654.
—— *Chap.* 379, *Laws of* 1860.
—— *Chap.* 853, *Laws of* 1868.
—— *Chap.* 629, *Laws of* 1872.
See Callahan v. The Mayor (Mem.), 656.

STATUTE OF FRAUDS.

1. One S. had contracted, by parol, to sell and deliver to plaintiffs a quantity of cheese, but being made to believe, by the fraud of defendant, that plaintiffs did not want the cheese, sold to defendant. The contract was not binding under the statute of frauds, but would have been performed by S. had it not been for the fraud. *Held*, that an action was maintainable against the defendant therefor. *Rice v. Manley.* 82

2. In an action upon a contract required by the statute of frauds to be in writing it is not necessary to allege in the complaint that it is

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contract is
r alleged to
in writing,
no defence.
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3. A parol agreement in reference to lands, not authorized by the statute of frauds (2 R. S., 134, §§ 6, 8), is void as well in equity as in law. *Wheeler v. Reynolds.* 227

4. Where, in reliance upon the agreement, one party has so far partly performed that it would be a fraud upon him unless the agreement should be performed, or where the agreement attempts to create a trust and was induced by fraud, the court has equitable jurisdiction to relieve against the fraud and to apply a remedy by enforcing the agreement. In such case, the jurisdiction is founded not upon the agreement, but upon the fraud. *Id.*

5. A part performance of a parol agreement, void by the statute of frauds, which will take it out of the operation of the statute, must be substantial, and the acts of part performance must also clearly appear to have been done solely with a view of performing the agreement. *Id.*

6. A mere refusal to perform a parol agreement, void under the statute of frauds, is in no sense a fraud either in law or equity. *Id.*

7. In an action for specific performance of an alleged parol agreement, plaintiff's evidence tended to show that he being the owner of premises upon which was a mortgage owned by defendant, and being insolvent,
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gage, with costs and expenses, and pay plaintiff the balance. It was not agreed that plaintiff should not attend the sale, or that he

should prevent others from bidding. Defendant foreclosed and bid in the property; nothing was said at the sale about the agreement, and nothing said or done by defendant to prevent competition. Plaintiff did not attend the sale, but there was no proof that he omitted to attend or to procure others to attend in reliance upon the agreement, and that, but for the agreement, he or some other person procured by him could or would have bid it off. Defendant's claim, with costs and expenses, was about what the land was worth. There was no allegation or proof of fraud in the agreement or sale. Defendant took possession of the premises, paid taxes, etc., for nine years when this action was commenced, the land then having greatly increased in value. *Held*, that the alleged agreement could not be enforced either on the ground of part performance or as a parol trust. *Id.*

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STOCK.

A company had been organized, composed of individuals owning oil lands, under the name of the E. P. Co., and all of its stock subscribed for. It was the intention to have it incorporated on the basis of the property so held, but before this was done defendant, who was a subscriber to the stock, agreed with plaintiff that if the latter would pay to the treasurer $500 he would see that plaintiff had a half share of the stock. Plaintiff paid the money, which was credited to defendant. A corporation was subsequently duly incorporated identical as to shareholders and property, but named the R. F. P. Co. No stock was transferred to plaintiff and no demand therefor was made by him. The R. F. P. Co. becoming embarrassed its property was, by direction of its directors, sold at auction and bid in by H. for the benefit of the stockholders. Defendant paid his proportion of the sum bid. In an action to recover the $500, *held*, that, to put defendant in default, a demand by plaintiff of the stock was requisite, or proof given that it was out of defendant's power to transfer it; that defendant's contract would have been performed by a transfer of stock in the corporation succeeding to the property of the E. P. Co; and that a transfer by defendant to plaintiff of an interest in the property held by H. in trust, equal to the interest defendant contracted to convey, would have satisfied any equitable claim of plaintiff and have been a legal performance of the contract. *Weller* v. *Tuthill*. 347

STOCK BROKER.

1. The relation of broker and customer, under the ordinary contract for a speculative purchase of stock, is that of pledgee and pledgor. (ALLEN and RAPALLO, JJ., dissenting.) *Baker* v. *Drake*. 513

2. A sale of the stock by the broker under such contract, without notice to the customer of the time and place of sale, is a conversion. (ALLEN and RAPALLO, JJ., dissenting.) *Id.*

3. Oral proof of the usage of brokers in such cases, is not admissible to add to or make part of the contract. (ALLEN and RAPALLO, JJ., dissenting.) *Id.*

4. The parties to the contract, however, may provide therein for any manner of disposing of the pledge to satisfy the claim upon it, which is not in contravention of a statute, against public policy, or fraudulent *Id.*

5. Plaintiff employed defendants to purchase stocks for him upon margin, he agreeing that all transactions in stocks should be in every way subject to the usages of defendants' office. In an action for a conversion, by an alleged sale without notice, of stocks purchased, defendants offered to prove that it was the custom of

their office to sell on account of failure to furnish sufficient margin at the stock exchange without giving notice to the customer of the time and place of sale. This offer was rejected. *Held* (CHURCH, Ch. J., ANDREWS and MILLER, JJ., dissenting), error. *Id.*

6. Upon the question of damages the court charged the jury, in substance, that if the right of action was established, plaintiff was entitled to recover what it would have cost him to replace the stocks on a day within a reasonable time after the sale, deducting the sum due to the defendants. *Held*, no error. *Id.*

SUBROGATION.

1. The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his own rights or to save his own property. *Cole* v. *Malcolm*. 363

2. C., being indebted to plaintiff, conveyed certain lands through a third person, without consideration, to his wife, who died intestate. Plaintiff thereafter recovered judgment against C., and, after return of execution thereon unsatisfied, commenced an action against C. and the heirs of his wife to set aside the conveyance as fraudulent against creditors, and obtained a judgment setting it aside as to plaintiff, declaring his judgment a valid lien thereon, and appointing a receiver to sell, etc. The receiver advertised the land for sale. Defendant M., one of the heirs, and who had succeeded by purchase to the rights of nearly all the others, tendered the amount due on plaintiff's judgments, and demanded an assignment thereof, which was refused. M. thereupon made a motion to compel an assignment upon payment, and that he be subrogated to the rights of the owner of the judgments, which was denied. *Held*, error; that the title of the heirs was good as against C., and upon payment of the judgments, which were his debts, to save their lands, they were entitled to subrogation as against him. *Id.*

3. Also, *held* (ALLEN and FOLGER, JJ., dissenting), that the point that it was discretionary with the Supreme Court whether to entertain the motion or to turn M. over to an action not having been taken by respondent, and the motion having been disposed of below upon the merits, and not upon the ground that an action should have been commenced, the point would not be considered here. *Id.*

SUMMARY PROCEEDINGS.

1. The provisions of the statute authorizing summary proceedings by a landlord to dispossess a tenant for non-payment of rent (2 R. S., 512, § 28, as amended, chap. 828, Laws of 1868) apply to and include proceedings against corporate bodies as well as individuals. *Brown* v. *The Mayor*. 385

2. Summary proceedings were commenced in a District Court of the city of New York by plaintiff against the defendant and the board of police commissioners. The affidavit and summons alleged that defendant was the tenant, and occupied through itself and the said board as under-tenants. Defendant did not appear, but the board appeared, and, by consent, the matter was adjourned. *Held*, that the adjournment was proper, and that the court was not thereby ousted of jurisdiction to proceed on the adjourned day against defendant. *Id.*

3. The affidavit, upon which the proceedings were based, was sworn to before a notary public. *Held*, that it was properly verified. (§ 4, chap. 741, Laws of 1870.) *Id.*

4. A judgment taken by default in summary proceedings for non-payment of rent, until reversed, set aside or vacated, is conclusive in an action by the landlord against the tenant to recover the rent, of the facts alleged in the affidavit, and which are required by the

statutes to be alleged as the basis of the proceedings, to wit: the tenancy, the occupation by the tenant, the non-payment of rent due, and the holding over after default in payment. *Id.*

SUMMONS.

1. A resident of a foreign State, while attending a court of this State as a witness, cannot be served with a process for the commencement of a civil action against him. *Person* v. *Grier*. 124

2. As to whether a distinction in respect to their immunity exists as to suitors and witnesses from a foreign State, and those residing in this State, *quære*. *Id.*

SURROGATE'S COURT.

1. The admission of improper evidence in proceedings before a surrogate for the probate of a will is not ground for the reversal of his decision admitting the will to probate, if it appears from the whole case that the will was properly sustained. *Brick* v. *Brick*. 144

2. Where, in the matter of a probate of a will, the surrogate has acquired jurisdiction of all the parties in interest, he is not divested of this jurisdiction by the death of one of the parties; and where the survivors appear and litigate, without objection because of an omission to bring in the heirs and representatives of the deceased party, such omission cannot impair the validity of the proceedings as to the survivors. *Id.*

——*When decree of surrogate on settling executor's accounts will not bind legatee.*
See Fisher v. *Banta*, 468.

——*When decree of surrogate settling executor's accounts no bar to action against him as trustee.*
See Fulton v. *Whitney*, 548.

——*When order of surrogate directing payment of legacy before settlement of executor's account improper.*
See Gilman v. *Gilman* (Mem.), 631.

TAXATION.

See ASSESSMENT AND TAXATION.

TENANTS IN COMMON AND JOINT TENANTS.

1. *It seems*, that the license of one of two or more owners in common of letters patent confers a right as against all, and the remedy of the other tenants in common is by action for an account for whatever may have been received by the licensor. *De Witt* v. *N. H. M. Co.* 459

2. So, also, one of two or more tenants in common has the right to use the invention without the consent of the others, and is not liable to account to them for the profits made by such use *Id.*

——*When invalidity of patent no defence in an action by one of two joint owners of letters patent for an invention, against the other to recover license fees.*
See Marston v. *Swett*, 206.

TITLE.

——*When owner, by authorizing delivery of warehouse receipt, is estopped from claiming title to property.*
See Voorhis v. *Olmsted*, 113.

TOWN BONDING.

1. As to whether the prior decisions in this State, holding that the legislature had power, under the Constitution, to authorize municipal corporations to subscribe for and hold stock in railroad corporations, and to issue their bonds

v. *Town of D.* 129

2. Where, however, in pursuance of legislative enactment, municipal bonds have been issued and transferred to purchasers for value, prior to the decision in *People* v. *Bachellor*, they are protected by the earlier decisions, and as far as their validity depends upon the constitutional power of the legislature, will be sustained. *Id.*

3. Although the legislature cannot compel a municipal corporation to subscribe for railroad stock and to issue its bonds in payment therefor, yet, where, under a mandatory act, the municipality has voluntarily and without the compulsion of judicial process subscribed for and taken the stock and issued its bonds, the latter are not invalidated by the compulsory character of the act. It operates as an authority and permission to do the acts, and, having been done, they will be considered as having been done voluntarily. (ANDREWS, J.; FOLGER and RAPALLO, JJ., concurring.) *Id.*

4. In an action upon bonds issued in 1862 by defendant's railroad commissioner to pay for subscriptions to stock of the A. and S. R. R. Co., *held*, that although the bonds were issued without a compliance with the conditions precedent prescribed in the acts authorizing such subscription (chap. 64, Laws of 1856, and acts amendatory thereof), yet that the same were validated by the provision of the act of 1864 (chap. 402, Laws 1864), declaring that when the road of said company shall have been constructed through a town its bonds shall be valid, although such conditions were not complied with. (ANDREWS, RAPALLO and FOLGER, JJ., concur, on the ground that the legislature had power thus to vitalize the bonds; CHURCH, Ch. J., and ALLEN, J., while doubting the power, concur, on the ground that, as to the defendant's bonds, the court was concluded by the decision of the Commission of Appeals in *Town of Duanesburgh* v. *Jenkins* [57 N. Y., 177].) *Id.*

TOWN CLERK.

——*Not required to file chattel mortgage without payment of fees.*

See People ex rel. v. *Hayt* (Mem.), 606.

TRADE MARK.

1. To entitle a party to relief for an alleged infringement of a trade-mark, the resemblance of the simulated to the genuine trade-mark must be such as to amount to a false representation, which is liable to deceive the public and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. When ordinary attention on the part of customers will enable them to discriminate between the trade-marks of different parties, the court will not interfere. *Popham* v. *Cole*. 69

2. Plaintiff, a dealer in refined lard, stamped upon the cans in which it was put up for sale the figure of a large fat hog, which he claimed as a trade-mark; above the figure was his own name and the words "prime leaf lard." Defendants, who were engaged in the same business, under the firm name of "H. J. Wilcox & Co.," stamped upon their packages a globe, with a small, gaunt wild boar on top. Over this was the firm name, and below it the words "prime leaf lard." The letters and arrangement of the two were entirely different. In an action to restrain the use of the figure of a hog, to which the plaintiff claimed the right to exclusive use, as a trade-mark, *held*, that no fraudulent, deceptive imitation was established, as there was no such resemblance between the two devices or symbols as to deceive a purchaser of ordinary caution; that neither defendant's device alone, nor that in connection with his entire brand and mark, amounted to a representation, direct or indirect, that the article they sold was manufactured by plaintiff; and that, therefore, the action was not maintainable. *Id.*

3. As to whether plaintiff could appropriate to his own use, as a

trade-mark, the picture of the animal from which not only his own, but the lard of all other dealers and manufacturers is derived, particularly when the same symbol has been used indiscriminately by dealers in lard and other products of the slaughtered animal, *quære*. *Id.*

TRESPASS.

—— *Action for, against highway officers for turning water from highway on lands adjoining, when not maintainable.*

See Kellogg v. *Thompson*, 88.

—— *When maintainable against highway officers for opening a highway, and what amounts to dedication.*

See N. F. and S. B. Co. v *Bachman*, 261.

TRIAL.

1. In an action upon an account for goods sold and delivered, it appeared that the account had been presented to defendants before the commencement of the action. One item they erased, supposing it charged twice; the balance was not objected to; the item, by mistake, was not included in the complaint or bill of particulars, but, upon the trial, the item was proved clearly. At the close of the evidence, plaintiffs' counsel moved to amend the complaint so as to include the item, which was objected to on the ground of surprise; the objection was overruled. *Held*, no error; that defendants could not have been surprised. *Parsons* v. *Sutton*. 92

2. A policy of fire insurance contained a clause declaring, in substance, that in case the assured caused the property to be described other than it really was, so that it be charged at a lower premium, or if the risk be increased by means within his control, without notice and consent, the policy would be void; also, that if the risk be increased by the erection of buildings, "or by the use of neighboring premises or otherwise," or if for any other cause the company shall so elect, it should be optional with the company, after notice to the assured or his representative, to terminate the insurance; in that case refunding a ratable proportion of the premium. In an action upon the policy, defendant's evidence tended to show that before the loss it notified the insured and plaintiff, who, as mortgagee, was, by the policy, entitled to receive the insurance in case of loss, that it elected to and did cancel the policy; defendants also tendered back the unearned premium. *Held*, that it was entirely optional with defendant when, and for what reason, to terminate the insurance, and the motive or the sufficiency of the cause could not be inquired into; and that, therefore, a refusal of the court so to charge, and a refusal to submit the question of cancellation to the jury, was error. *I. L. I. and T. Co.* v. *F. F. I. and T Co.* 119

3. One D. contracted with defendant to unload from vessels on to cars all the railroad iron brought to the dock at A. for a specified time and for a specified price, defendant to furnish a derrick to be used for the purpose. Defendant furnished a derrick suitable and safe at the time for use. Plaintiff was employed by D. to assist and was injured by a fall of the derrick. In an action to recover damages for the injury, *held*, that if D. was chargeable with negligence in omitting to inspect and repair the derrick, defendant was not responsible therefor; that in the absence of a contract to that effect no duty on the part of defendant to keep the derrick in repair could be implied; that the rule requiring a master to furnish safe and suitable machinery for the use of his servants did not apply, as plaintiff was not the servant of defendant; and that therefore a charge that in the absence of a special agreement defendant was bound to keep the derrick in repair, was error. *King* v. *N. Y. C. and H. R. R. R. Co.* 182

4. Defendant's evidence tended to show that it was to make repairs

when notified by D. that repairs were necessary. The court charged that if this were so and no notice was given, if the agreement was not known to plaintiff and the accident occurred from neglect to repair without negligence on the part of plaintiff, defendant was liable, *held*, error. *Id.*

5. A party to an action which is not referable without consent of the parties, by consenting to refer to a particular referee, does not waive his right to a trial by the court or a jury if for any reason the reference agreed upon falls through. *Preston* v. *Morrow*. 452

6. Upon the death, removal or refusal to act of the referee, the action is again in court for trial as if no reference had been consented to; and the court has not the right to order a new reference without consent of the parties. *Id.*

7. Defendant sold and assigned to plaintiff a legacy. In an action to recover damages, upon allegations that the purchase was induced by fraudulent representations, it appeared that defendant represented, in substance, that the legacy was as good as a mortgage upon any man's farm, and that plaintiff might inquire. Plaintiff did inquire of persons to whom he was referred by defendant, who stated the legacy to be good. Its value depended upon the question whether it was chargeable upon the testator's real estate. The personal estate was insufficient, but both real and personal more than sufficient to pay it. An attorney, at the request of the parties, examined the will and gave his opinion that the legacy was good. In an action subsequently brought to obtain a construction of the will it was adjudged that the legacy was not a charge upon the real estate. The court was requested to charge, in substance, that what was said by defendant was under the circumstances but an expression of opinion. The court refused so to charge, and submitted that question to the jury. *Held*, error; that defendant made no false statements of facts, and what he said could have been only an expression of opinion. *Duffany* v. *Ferguson*. 482

8. It appeared that defendant had been informed prior, to the sale, by one of the executors that an action for a construction of the will was about to be commenced, and that he did not disclose this to plaintiff. *Held*, (FOLGER and EARL, JJ., dissenting), that the judgment could not be sustained on the ground of a fraudulent concealment, although the action might have been maintained thereon, as this did not remedy the error in the refusal to charge, under which the jury may have held the representations made were fraudulent, and so have determined the case. *Id.*

9. Where the evidence in a case will warrant the jury in finding for the plaintiff on the whole issue, and the court is called upon by the defendant to decide it as a question of law, without requesting the submission of any question of fact to the jury, the finding of the facts by the court instead of by the jury, is not a ground of exception. *McCall* v. *S. M. Ins. Co.* 506

10. Upon trial of an action for malicious prosecution, defendants having caused plaintiffs arrest on a charge of embezzlement, the court charged in substance that if defendant, prior to making complaint against plaintiff, settled for the moneys claimed to have been embezzled as for moneys had and received, this would be evidence that he did not believe plaintiff had embezzled the moneys. *Held*, error; that if money was embezzled defendant had a right to settle as for a debt upon an implied contract, and such settlement was no bar to a criminal prosecution; nor did it furnish evidence that defendant did not believe the money had been embezzled. *Fagnan* v. *Knox*. 525

11. It was urged, in answer to the exception to the charge, that the moneys received by plaintiff were

not intrusted to him as agent, but were received from the cashier. It appeared that plaintiff was defendant's managing clerk having charge of the money and supervision over the employes including the cashier. *Held*, first, that money paid by the cashier to plaintiff by his direction was the same as if taken by himself from the drawer or safe, as he had charge of all the money; second, that the charge did not embrace this point. *Id.*

12. To maintain an action to recover damages for deceit, in inducing plaintiff to purchase worthless property, it is not necessary to show a return or offer to return the property. The action is *ex delicto*, and not upon contract, and an averment in the complaint of an offer to return may be disregarded. *Miller* v. *Barber*. 558

13. If the action be brought on the promise implied against a fraudulent vendor, that he will restore the consideration paid by the vendee upon his electing to rescind the contract, plaintiff is bound to aver and prove a return or offer to return the property upon discovery of the fraud. *Id.*

14. Where the copy of pleadings, furnished the court upon trial, contains a reply to a counter-claim set up in the answer, it is within the discretion of the court whether to receive proof that no reply was, in fact, served, or to leave defendant to his remedy by motion after trial, and its determination is not reviewable here. *Id.*

15. An action upon a policy of fire insurance was commenced in the name of L., as assignee. Subsequently, upon affidavits that it had been reassigned, the insured was substituted as plaintiff; defendant acquiesced in the order by receiving costs allowed to it. On the trial defendant objected to a recovery, without proof of an assignment and reassignment. The objection was overruled, and a motion was granted, without objection, conforming the complaint to the proof. *Held*, that the objection was untenable, as after the granting of the motion to conform there was nothing in the pleadings or proofs to show an assignment. *W. T. M. Co.* v. *H. F. Ins. Co.* 613

16. In asking hypothetical questions, for the purpose of obtaining the opinion of experts, counsel may assume facts as they claim them to exist; and an error in the assumption does not make the interrogatory objectionable, if it is within the possible or probable range of the evidence. *Harnett* v. *Garvey*. 641

—— *Erroneous charge in action for negligence.*

See Robinson v. *N. Y. C. and H. R. R. Co.*, 11.

See Sutton v. *N. Y. C. and H. R. R. Co.*, 243.

—— *When question whether credits for fire insurance premiums one of fact, and nonsuit error.*

See Church v. *L. F. Fire Ins. Co.*, 223.

—— *Erroneous charge as to constructive notice of revocation of agent's authority.*

See Claflin v. *Lenheim*, 301.

—— *Order of proof in discretion of court, proper charge as to damages in action for fraud, and as to sufficiency of evidence to sustain action.*

See Miller v. *Barber*, 559.

—— *Insufficiency of objection to evidence.*

See Stowell v. *Hazelett* (Mem.), 635.

—— *Proper charge on question of negligence.*

See Milliman v. *N. Y. C. and H. R. R. Co.* (Mem.), 642.

—— *Verdict in action for fraud, when presumed correct.*

See Card v. *Duryee* (Mem.), 651.

TRUSTS AND TRUSTEES.

1. R. died seized of certain premises, which were mortgaged to defendant. R. devised to his widow, whom he made his executrix, a life estate in a portion of the premises, with remainder to plaintiffs; the balance, with his personal property, he directed his executrix to sell, and with the proceeds pay and discharge his debts, in-

cluding the mortgage. Defendant, after R.'s death, commenced an action for foreclosure, making the widow and plaintiffs, who were infants, parties; they were served with process, but, although their infancy was known, no guardian *ad litem* was appointed. The widow answered, but, under an arrangement with defendant that he would lease to her for life at a nominal rent a portion of the mortgaged premises, she executed a deed to him of the portion of the premises directed to be sold, which was worth $5,950, for the nominal price of $500, to be applied on the mortgage; she also withdrew her answer, and stipulated that defendant might take judgment for the full amount of the mortgage, without crediting the $500. Judgment by default was taken against plaintiffs, under which the premises were sold and bid in by defendant for much less than their value. There was a surplus on the sale of over $2,000 which was never brought into court, and plaintiffs received no part of it. No report of sale was filed or confirmed. In an action to set aside the judgment and sale, *held*, that the executrix stood in a relation of trust towards plaintiffs, so far as the exercise of the power of sale was concerned, and violated her trust in conveying for a nominal consideration; that defendant was a party to its violation, and that the facts sustained a finding of fraud and collusion; that plaintiffs were entitled to have the decree of foreclosure avoided as to them, and could maintain an original action in equity for that purpose; that as to plaintiffs, their equity of redemption not being barred by the foreclosure, defendant, when he entered under his purchase, became merely a mortgagee in possession, and as such, bound to account for their share of what he realized from the mortgaged property, over and above the mortgage debt. *McMurray* v. *McMurray*. 175

2. Where a parol agreement, purporting to create a trust in lands, is part of a scheme of fraud, or a party is fraudulently deprived of valuable rights or property by means thereof, the court will raise an implied trust, treating the person who perpetrated the fraud as trustee *ex maleficio*. *Wheeler* v. *Reynolds*. 227

3. A fraud which will convert a purchaser of real estate into a trustee *ex maleficio* must be fraud at the time of the purchase, not afterwards; and the mere acquiescence or omission of another to take steps to obtain the property, although induced by faith in the purchaser's parol promise to purchase for his benefit, will not estop him from denying the trust; to work an estoppel, the promisee must have been induced, at the instance of the promissor, to incur some expense or perform some act which he otherwise would not have done. *Id.*

4. An order of General Term, affirming an order of Special Term reviving against his executors a special proceeding instituted against a discharged trustee, and pending at his death, is not appealable to this court; it is not "a final order affecting a substantial right made in a special proceeding" within section 11 of the Code (sub. 3), but an intermediate order relating to the procedure. *In re Whittlesey* v. *Hoguet*. 358

5. A trustee cannot purchase for his own benefit property which, although not the subject of the trust, is connected with it in this, that a sale of the property for less than its value will diminish the trust fund; and a purchase by him for less than the value of the property inures to the benefit of the *cestui que trust*. *Fulton* v. *Whitney*. 548

6. No actual fraud on the part of a trustee so purchasing need be shown to give to the *cestui que trust* the benefit of the purchase. *Id.*

7. The will of P. W. bequeathed to his executors W. and T. a fund in trust. First. To pay debts not otherwise provided for. Second.

To pay certain legacies. He left certain real estate incumbered by a mortgage given to secure his bond. The mortgage was foreclosed and the premises bid off by W. T. and their partner J., who was cognizant of all the facts, for $5,000. The premises were worth $10,000. The sale left a deficiency of $6,577.48, which, as a debt unprovided for, was paid by the executors out of the trust fund, thereby rendering it insufficient to pay said legacies. Plaintiff, one of the legatees, and by the death of the other legatees entitled to all of said legacies, was an infant, W. being her general guardian. In an action to have a trust declared in plaintiff's favor in the property purchased, *held*, that W. and T. could not become purchasers for their own benefit; that, while they were not bound to buy in the property for the benefit of the trust estate, having no trust funds applicable to that purpose, they had no right, by undertaking to purchase for their own benefit, to create an interest in themselves hostile to their duty as trustees; that J. stood in no better position than his associates in the purchase, but was affected by the same legal disabilities. *Id.*

8. Also, *held*, that a provision in the decree of foreclosure authorizing any of the parties to become purchasers was no protection to the purchasers here, nor did the confirmation of the sale have such effect, as the rights and equities of plaintiff were not before the court or involved in the foreclosure suit. *Id.*

9. Also, *held*, that a decree of the surrogate settling the accounts of W. and T. was no bar to the action. *Id.*

10. The judgment of the court below allowed to plaintiff the value of the real estate at the time of the purchase, less the amount paid. *Held*, no error; that the judgment was as favorable to defendants as the circumstances of the case would admit. *Id.*

11. Actual and clearly proved fraud will not be protected by the statute prohibiting parol trusts in real property. (2 R. S., 134, § 6.) *Hall* v. *Erwin.* 649

—— *Title to corporate property after expiration of charter, vests in the trustees in trust for stockholders.*
See C. C. S. Bk. v. *Walker.* 424

USAGE.

—— *As affecting policies of marine insurance,*
See McCall v. *S. M. Ins. Co.*, 505.
—— *Of stock brokers, when evidence of proper in action against broker for conversion of stock pledged.*
See Baker v. *Drake*, 518.

USURY.

1. A contract for a loan was claimed to be usurious; first, because a bond given to secure the loan was conditioned to pay $5,000, when but $4,000 was loaned; second, that for $2,000 of the loan plaintiff gave his notes for twenty and thirty days without interest. In the assignment of the bond it was stated that it was to secure the payment of $4,000, and it was intended and treated by the parties as a security for that sum only. The giving of the notes was not found to have been done with intent to secure more than lawful interest. *Held*, that, for the purpose of sustaining the judgment, a finding that there was no such intent might be implied, and that the circumstances did not constitute usury in law. *Brown* v. *Champlin.* 214

2. Where a lender has received a security providing for the payment of the precise amount loaned by him with lawful interest, the fact that his agent, without his authority, knowledge or participation, has extorted from the borrower a sum of money upon the false pretence that a portion thereof was a bonus for his principal does not taint the security with usury. *Esteves* v. *Purdy.* 446

3. The employment of an agent to effect a loan does not impliedly or

apparently authorize him to violate law or do an illegal act. *Id.*

4. The fact that an action upon the security is commenced by the principal after knowledge upon his part of the exaction of the agent is not a ratification thereof; the security coming to him unaffected by usury, he has the right to enforce it. *Id.*

5. After payment of a portion of the amount due upon a bond secured by mortgage, the obligors applied to the agent of the obligees for a reloan of the sum paid upon the same securities. This the obligees agreed to. The agent exacted of the obligors $225 professedly for the obligees, who did not receive any portion of it and knew nothing of the representation. One of the obligees was informed by the obligors before the loan of the terms their agent exacted, to which he replied that it was too much for the agent's services. The obligees loaned the full amount, and it did not appear that they knew how much was finally paid or agreed to be paid to the agent. *Held*, that the evidence rebutted any inference that the obligees connived at, consented to, or authorized the charge, and that, therefore, there was no usury. *Id.*

6. B. & C. were agents for the M. P. Life Ins. Co., for soliciting insurance and had a desk in its office. Defendant K. agreed to give B. & C. a bonus or commission of $3,000, to be paid by assigning certain small mortgages for procuring a loan from said company of $7,000. The loan was obtained upon bond and mortgage, K. receiving from the company the full amount of the loan. The small mortgages were assigned to the father of B., who was second vice-president of the company. The papers were drawn by its attorney, executed in its office, and put into its safe, and subsequently were assigned to it. B.'s father, however, testified that he had no interest in the mortgages, but took the assignments in his own name at the request of his son, who was at the time of their execution absent, and that he was to pay to B. the proceeds; that upon the assignment to plaintiff he received credit for the full amount of the mortgages, and that prior thereto plaintiff had no interest in them. In an action to foreclose the mortgage given to secure the loan, *held* (CHURCH, Ch. J., dissenting), that the evidence failed to show that plaintiff was a party to the agreement for the bonus or received any benefit therefrom, and so did not sustain the defence of usury. *G. M. L. Ins. Co.* v. *Kashaw.* 544

VENDOR AND VENDEE.

—— *What are fixtures, as between.*
See McRea v. *C. N. Bk.*, 489.

WAIVER.

A party to an action which is not referable without consent of the parties, by consenting to refer to a particular referee, does not waive his right to a trial by the court or a jury if for any reason the reference agreed upon falls through. *Preston* v *Morrow.* 452

—— *Of notice required by insurance policy, what is.*
See McNeilly v. *C. L. Ins. Co.*, 23.

—— *Of forfeiture under lease, what amounts to.*
See Riggs v. *Pursell*, 193.

—— *Of condition in policy of insurance requiring cash payments, what amounts to.*
See Church v. *L. F. F. Ins. Co.*, 223.

—— *Of forfeiture under building contract, what amounts to.*
See Murphy v. *Buckman*, 297.

WAREHOUSEMEN.

Plaintiffs contracted to sell to B. & Co. a quantity of cotton, in store, to be paid for on delivery. The N. Y. W. and S. Co. loaned to B. & Co. a sum of money, receiving as security an invoice and written pledge of the cotton, and an order

upon the warehouseman. Upon presentation of the order, and while the cotton was being weighed and examined for delivery, the warehouseman, with the consent of plaintiffs, gave to the N. Y. W. and S. Co. the ordinary warehouse receipt for the cotton. This was on Saturday. B. & Co. did not pay for the cotton, and on the next Tuesday failed. In an action to recover possession of the cotton, *held*, that, upon the occasion of the loan to B. & Co., the N. Y. W. and S. Co. acquired no title to the cotton, as against plaintiffs, as it parted with its money solely upon the engagement of that firm, and upon their order; that no title was acquired at the time of the delivery of the warehouse receipt, as no value was parted with upon the faith of it; but that, upon receiving the receipt, said company had a right to repose upon it as a ratification of the prior pledge, and having relied upon it and thereby having been induced to refrain from any attempt to recover the loan or secure as indemnity, plaintiffs were estopped from claiming title. *Voorhis* v. *Olmstead*. 113

WARRANTY.

—— *Implied in policy of marine insurance, and effect of breach of.*
See Leitch v. *A. M. Ins. Co.*, 100.
—— *In policy of fire insurance, what is.*
See Alexander v. *G. F. Ins. Co.*, 464.

WATER COURSES.

In an action commenced in 1873, against commissioners and an overseer of highways, for damages alleged to have been sustained by turning the waters of a stream from a highway upon plaintiff's adjoining premises, it appeared that originally the stream crossed the highway on to said premises, then, turning, recrossed the highway. About 1850, an artificial channel was made, proceeding a short distance from the first crossing, along the side of the traveled track of the highway, and thence through an artificial ditch on to and over plaintiff's land. In 1864 plaintiff, as overseer of highways, extended the artificial channel along the highway until it intersected the original stream; he also filled up the artificial channel on his land; the waters injured the highway, rendering it at times impassable, and defendants turned them into the original channel. *Held*, that the first change did not relieve plaintiff's land from the burden of the stream, or give him any prescriptive right to have it flow along the highway; that, as overseer, he had no right to relieve his own premises at the expense of the public; that it was the right and duty of defendants to abate the nuisance caused by the stream obstructing the highway, and they were justified in restoring said stream to its original channel. *Kellogg* v. *Thompson*. 88

—— *Grant of rights to take water from spring construed.*
See Markham v. *Stowe*, 574.

WESTCHESTER COUNTY.

—— *Act of* 1873 *annexing towns of, to New York city, construed.*
See People v. *Flanagan*, 287.

WILLS.

1. The will of J. devised his real estate to his wife for life, remainder to H., an adopted son, "and his heirs." The words quoted were interlined. In another clause in the will he charged certain bequests upon "the estate hereby devised to" H. H. died prior to the death of the testator. In an action for partition of the lands, *held*, that while the word "heirs" could be considered as "children," where from the whole will that appeared to have been the intent, there was no evidence here of such intent, and the word was, therefore, one of limitation, not of purchase; that the devise lapsed and

the children of H.
in the land. *Thurl*

3. In the clause of the will giving bequests was a provision directing that W. should be maintained and provided for during life out of the testator's estate, and the estate devised to H. [illegible] the bequests [illegible] clause, and th[illegible] "a mortgage [illegible] vised. By a c[illegible] case of the de[illegible] wife prior to [illegible] whole estate, real and personal, was given to H., subject to the payment of the legacies "and to the support and maintenance of the said" W. *Held*, that the provision for the support of W. was a "bequest," and was a lien and charge upon the real estate devised to H.; and that, although the devise lapsed, the lien followed the remainder in the hands of the heirs of the testator. *Id.*

3. Plaintiffs, at the request of W., and upon the faith and credit of the provision made for her in the will, supported her during her life. *Held*, that it was to be presumed it was the intention of the parties that plaintiffs should have the benefits of the provision of the will, to which intent the court of equity would give effect, and that therefore, a holding of an equitable assignment in favor of plaintiffs was proper. *Id.*

4. A person having capacity sufficient to acquire a large fortune by personal industry and intelligence, who successfully conducts a large business whose business correspondence shows a clear comprehension of the subjects upon which he writes, and who is pronounced by his intimate friends of sound mind, and of more than ordinary intelligence and firmness, will not be considered as incompetent to make a [illegible] made to appear that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity, which could not be resisted, so that the testator was constrained to do that which was against his actual will, but which he was unable to refuse or too weak to resist. *Id.*

6. [illegible]

7. The admission of improper evidence in proceedings before a surrogate for the probate of a will is not ground for reversal of his decision admitting the will to probate, if it appears from the whole case that the will was properly sustained. *Id.*

8. Where, in the matter of a probate of a will, the surrogate has acquired jurisdiction of all the parties in interest, he is not divested of this jurisdiction by the death of one of the parties, and where the survivors appear and litigate, without objection because of an omission to bring in the heirs and representatives of the deceased party, such omission cannot impair the validity of the proceedings as to the survivors. *Id.*

9. [illegible]

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will, held, that an intent to convert absolutely the real estate into money did not appear, and no such conversion was made by the will. *Gourlay* v. *Campbell.* 160

10. It appeared that the personal estate of the testator was amply sufficient to provide for the support and maintenance of the testator's widow and children. The real estate was not disposed of by the executors. *Held*, that as no necessity existed for a sale of the realty for the purpose specified in the will, to this extent the purpose had failed, and that the land retained its original character and descended to the heirs. *Id.*

11. The will of B. gave to his wife all his real and personal estate during her life, she to provide and care for their children until they came of age, and directed that after her death "all the real estate which may be found" should be divided among the sons and the personal estate among the daughters. The widow died before the children became of age. In an action brought to charge the support of all the children, after the death of the widow, upon the real estate, *held*, that the provision for the support of the children terminated at the death of the widow, and, thereupon, the sons became entitled to a division of the real estate remaining; and that the same was not chargeable with the support of the daughters. *Brandow* v. *Brandow.* 401

12. The will of B. directed his executrix to divide his real estate equally between his two sons, C. and S., after the youngest arrived at the age of twenty-three. In a codicil he directed his executrix to sell all his real estate. Both sons survived the testator. In an action for a construction of the will, *held*, that there being no purpose for the sale expressed in the codicil, the fair inference was it was for the purpose of division; that as the sons survived, the purpose had not failed; and that the direction to sell operated as a conversion of the real estate into personalty immediately upon the death of the testator and the land became money for all purposes of administration, the sons taking their interest as legatees; and that upon the death of C. before actual sale, his interest passed to his personal representatives. *Fisher* v. *Banta.* 409

13. Also, *held*, that conversion was not prevented because the legal estate was not given in trust to the executrix, or because there was no devise of the lands, and they pass by descent to the two sons. *Id.*

14. C. died soon after B., leaving a will by which he bequeathed certain legacies and made his brother C. residuary devisee and legatee. The executrix of B. sold portions of the real estate, and upon an accounting by her the proceeds were brought into court and distributed by decree of the surrogate as personal estate, one moiety to S., the other to H., executor of B., who therewith paid the legacies in part. Before the balance of the lands were sold the executrix died and H. was appointed administrator, with will annexed. The share of C. in the estate of B. was the only source from which the legacies given by his will could be paid. On an accounting had at his request, as such administrator, S. and H., as the executors of C., were made parties; the legatees were not. The surrogate adjudged, in substance, that there was no conversion of the real estate of B. under his will, and that S., as residuary devisee under the will of C., was entitled to one-half the real estate unsold and one-half the proceeds of what had been sold, and settled the accounts under this theory. H. refused an appeal or to allow the legatees to appeal in his name, although they offered indemnity. *Held*, that the legatees were not concluded by the decree, as the estate of C. was not represented on the accounting in such a sense as to bind them; that while in ordinary cases, in proceedings upon application of an executor or administrator for an accounting, the service of a citation upon the exec

ministrator of a deceased would be sufficient, in the of fraud or collusion, to estate, yet as here H. rep both estates, the legatees not be concluded by a pr by him against himself, bu have been made parties; said legatees could mair action for a construction wills. *Id.*

15. The will of P. W., bequeathed to his executors W. and T. a fund in trust: First. To pay debts not otherwise provided for. Second. To pay certain legacies. He left certain real estate incumbered by a mortgage given to secure his bond. The mortgage was foreclosed and the premises bid off by W. T. and their partner J., who was cognizant of all the facts, for $5,000. The premises were worth $10,000. The sale left a deficiency of $6,577.48, which, as a debt unprovided for, was paid by the executors out of the trust fund, thereby rendering it insufficient to pay said legacies. Plaintiff, one of the legatees, and by the death of the other legatees entitled to all of said legacies, was an infant, W. being her general guardian. to purchase for their own benefit, to create an interest in themselves hostile to their duty as trustees; that J. stood in no better position than his associates in the purchase, but was affected by the same legal disabilities. *Fulton v. Whitney.* 548

WITNESS.

1. A resident of a foreign State, while attending a court of this State as a witness, cannot be served with a process for the commencement of a civil action against him. *Person v. Grier.* 194

2. As to whether a distinction in respect to their immunity exists as to suitors and witnesses from a foreign State, and those residing in this State, *quære.* *Id.*

Ch. R. J. O.

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